

# Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter

Paul Michell†

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† Associate, Tory Tory DesLauriers & Binnington, Toronto. I am grateful to Sujit Choudhry, Mark Drumbl, and Jasminka Kalajdzic for their helpful comments on earlier drafts. Errors are mine alone.

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## I. INTRODUCTION

### A. *Problems of Extradition and Canadian Law*

Most problems of modern extradition law can be encapsulated in a single proposition: International borders are at once essential, yet unimportant. They are essential because the world is divided into sovereign states, each with its own government and system of criminal justice, and unimportant because the speed and ease of movement across borders in the twentieth century has enabled fugitives to evade the law enforcement authorities of one state by fleeing to another. The paradox is that fugitives wish to take advantage of this ease of travel while reserving the right to seek the protections of one state's law against extradition to another. All states that have entered into extradition treaties and possess a domestic legal system for the protection of human rights face the same problem.

An effective and efficient network of extradition treaties serves the public interest. Extradition is of cardinal importance to the efforts of states to combat crime. States seek to secure the return of fugitives who have fled to other states and to return fugitives who have fled to their shores to face justice abroad. At the same time, they must avoid trammelling the rights of fugitives. Historically, this concern has been largely overlooked. Only in recent years have the courts grappled with the difficult balancing exercise that weighs the imperatives of the public interest against the protection of individual liberties.

Canada has been at the forefront of attempts to strike the right balance in extradition law between public goals and private rights. The introduction

of the Canadian Charter of Rights and Freedoms<sup>1</sup> in 1982 introduced constitutional judicial review on substantive grounds to Canada for the first time. Since then, the Supreme Court of Canada has decided several important extradition cases. Each decision has addressed how the advent of the Charter has affected Canada's extradition legislation and system of international treaties and, specifically, how the newly guaranteed rights of fugitives can be protected without making the extradition system unworkable.

The interaction between the Charter and Canadian extradition law raises fundamental questions about the nature and scope of Charter adjudication.<sup>2</sup> It also highlights the relationship between domestic and international law and, especially, the role of international law in the development and articulation of domestic constitutional norms. This Article argues that when faced with abstract Charter provisions in the extradition context, courts should look to international human rights norms as an interpretative guide. In addition, courts should refer to other relevant domestic legislation. Finally, this Article contends that courts should consider the manner in which foreign law is treated in conflict of laws cases as an appropriate analogy for extradition cases.

## B. *Unresolved Questions About the Application of the Charter to Extradition*

### 1. *How Should Constitutional Judicial Review Be Exercised in Extradition Cases?*

Canada has long been a party to treaties enabling it to extradite fugitives, both Canadian citizens and foreigners, to foreign states.<sup>3</sup> The international obligations stemming from these treaties have been implemented in domestic law.<sup>4</sup> The advent of the Charter has subjected this legislation to

1. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter Charter].

2. Extradition is "the surrender by one state to another, on request, of persons accused or convicted of committing a crime in the state seeking the surrender." *R. v. Schmidt* [1987] 1 S.C.R. 500, 514 (Can.).

3. Most of the extradition treaties to which Canada is a party are listed in ANNE WARNER LA FOREST, *LA FOREST'S EXTRADITION TO AND FROM CANADA* 359-86 (3d ed. 1991).

4. Extradition is governed by the Extradition Act, R.S.C., ch. E-23 (1985) (Can.), as amended. Rendition is the equivalent of extradition between Commonwealth states and is governed by the Fugitive Offenders Act, R.S.C., ch. F-32 (1985) (Can.). On the distinction between extradition and rendition, see *Chan c. Directrice de la Maison Tanguay* [1996] R.J.Q. 335 (Que. Super. Ct.) (Can.), *aff'd*, [1996] 113 C.C.C.3d 270 (Que. C.A.) (Can.), *leave to appeal refused*, [1997] 114 C.C.C.3d vi (Can.); *Commonwealth of Australia v. Cousins* [1992] O.J. No. 598 (Ont. Prov. Div.) (Can.); *Great Britain v. Taylor* [1988] 5 W.C.B.2d 313 (Ont. Prov. Ct.) (Can.). Rendition, unlike extradition, is not treaty-based. The distinction in procedural protections provided to a fugitive who is to be rendered to a foreign state as opposed to being extradited does not ground a Charter challenge under section 15. See *Philippines (Republic) v. Pacificador* [1993] 14 O.R.3d 321, 335-39 (Ont. C.A.) (Can.); *Hong Kong v. Sun* [1992] O.J. No. 1484 (Ont. Prov. Div.) (Can.), *appeal refused*, [1996] 109 C.C.C.3d 383 (Ont. C.A.) (Can.).

constitutional scrutiny under section 7 of the Charter.<sup>5</sup> Constitutional judicial review in extradition cases is complex because in many cases courts must evaluate the foreign criminal justice system that is requesting the return of the fugitive. Foreign criminal justice systems inevitably diverge in substance and procedure from the requirements imposed by Charter norms.

The Supreme Court of Canada consistently has acknowledged that the executive decision to surrender a fugitive for extradition is subject to review under the Charter. Yet, to date, the Court has resisted Charter-based challenges to Canadian extradition law. The Court has attempted to balance the rights of fugitives against the exigencies of the executive's conduct concerning foreign relations and the fight against transnational crime. Consequently, the Court has adopted a standard of review for extradition decisions that is deferential but that permits judicial intervention in compelling circumstances to quash surrender decisions. In this way, extradition law simultaneously ensures the speedy transfer of fugitives to the state where they are most appropriately tried and protects their rights.<sup>6</sup>

Nonetheless, several ambiguities remain in the Supreme Court of Canada's framework for judicial review of ministerial surrender decisions. Four recent cases—*United States v. Jamieson*,<sup>7</sup> *United States v. Ross*,<sup>8</sup> *United States v. Whitley*,<sup>9</sup> and *United States v. Leon*<sup>10</sup>—presented the Court with a splendid opportunity to clarify the governing principles for review of executive surrender decisions in extradition cases. The cases presented two main issues: What degree of constitutional protection is accorded to Canadian citizens who face extradition to a foreign state? And what is the relevance of the treatment to which the fugitive will be subjected in the requesting state? A tension between the rights of fugitives and Canada's treaty obligations infuses both issues.

The Supreme Court granted leave to appeal in all four decisions, suggesting that it considered the issues that they presented to be of national importance and that it wished to address them. Yet, inexplicably, the Court is-

5. See Charter § 7 ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.").

6. See *In re Evans* [1994] 1 W.L.R. 1006, 1008 (H.L.) (Eng.) ("Extradition treaties and legislation are designed to combine speed and justice."); accord *United States v. Dynar* [1997] 115 C.C.C.3d 481, 522 (Can.).

7. [1994] 93 C.C.C.3d 265 (Que. C.A.) (Can.), *rev'd*, [1996] 1 S.C.R. 465 (Can.) [hereinafter *Jamieson II*] (involving extradition of U.S. citizen to Michigan to face 20-year mandatory minimum sentence for sale of cocaine to undercover officer); see also *United States v. Jamieson* [1992] 73 C.C.C.3d 460 (Que. C.A.) (Can.) [hereinafter *Jamieson I*] (involving application challenging committal decision).

8. [1994] 119 D.L.R.4th 333 (B.C. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 469 (Can.) (discussing extradition of Canadian citizen to Florida to face 15-year sentence and \$250,000 fine for trafficking and conspiracy).

9. [1994] 119 D.L.R.4th 693 (Ont. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 467 (Can.) (involving extradition of Canadian citizen to New York for federal drug trafficking and conspiracy charges to face 20-year mandatory minimum sentence).

10. [1995] 96 C.C.C.3d 568 (Ont. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 888 (Can.) (discussing extradition of Canadian citizen to New York to face federal conspiracy and trafficking charges).

sued one-sentence decisions—a perfunctory style of judgment normally reserved for decisions involving meritless appeals by right—in *Jamieson II*, *Ross*, and *Whitley*, and its brief opinion in *Leon* did not address the full range of issues presented in that case. By merely adopting the reasoning of Justice Baudouin in *Jamieson II*, Justice Taylor in *Ross*, and Justice Laskin in *Whitley*, the Supreme Court left the two central issues raised by the cases in an uncomfortable state of uncertainty. Two subsequent decisions, *Mexico v. Hurley*<sup>11</sup> and *United States v. Burns*,<sup>12</sup> seem certain to return the issues to the Supreme Court for resolution. Justice La Forest recently retired from the Court,<sup>13</sup> so it will be facing these issues without the primary architect of the Charter framework for Canadian extradition law.

## 2. *What Is the Relevance of the Treatment to Which the Fugitive Will Be Subjected in the Requesting State?*

The second issue addressed in this Article is the relationship between the treatment that fugitives may receive abroad and reviews of ministerial decisions to extradite such fugitives. This dynamic has generated considerable controversy, both in Canada<sup>14</sup> and abroad.<sup>15</sup> It has arisen recently in an important decision of the Ontario Court of Appeal.<sup>16</sup> The broader issue of the treatment that the fugitive will face if extradited to the requesting state has arisen before Canadian courts in two particular contexts: extradition of a fugitive to face a mandatory minimum sentence that is harsh (perhaps uncon-

11. [1997] 116 C.C.C.3d 414 (Ont. C.A.) (Can.) (involving extradition of gay Canadian citizen to face murder charges in Mexico).

12. [1997] 116 C.C.C.3d 524 (B.C. C.A.) (Can.) (discussing extradition of Canadian citizens to face first-degree murder charges and death penalty in Washington state).

13. Justice La Forest retired from the Supreme Court of Canada effective September 30, 1997. See Sean Fine, *Top Court to Lose La Forest*, GLOBE & MAIL (Toronto), Aug. 27, 1997, at A1.

14. See LA FOREST, *supra* note 3, at 119–21; James C. Hathaway & R. Alexander Neve, *Fundamental Justice and the Deflection of Refugees from Canada*, 34 OSGOODE HALL L.J. 213 (1996); Amanda J. Spencer, *Fugitive Rights: The Role of the Charter in Extradition Cases*, 51 U. TORONTO FAC. L. REV. 54 (1993); Sharon A. Williams, *Extradition from Canada Since the Charter of Rights*, in THE CHARTER'S IMPACT ON THE CRIMINAL JUSTICE SYSTEM 387 (Jamie Cameron ed., 1996).

15. See Anne Mori Kobayashi, Note, *International and Domestic Approaches to Constitutional Protections of Individual Rights: Reconciling the Soering and Kindler Decisions*, 34 AM. CRIM. L. REV. 225 (1996); Jami Leeson, Note, *Refusal to Extradite: An Examination of Canada's Indictment of the American Legal System*, 25 GA. J. INT'L & COMP. L. 641 (1996); James D. McCann, Note, *United States v. Jamieson: The Role of the Canadian Charter in Canadian Extradition Law*, 30 CORNELL INT'L L.J. 139 (1997); Rita Patel, Note, *One More Effect of NAFTA—A Multilateral Extradition Treaty?*, 14 DICK. J. INT'L L. 153 (1995).

16. See *Hurley* [1997] 116 C.C.C.3d at 430–35; Michael Valpy, *Extradition Canadian-Style, With Eyes Firmly Shut*, GLOBE & MAIL (Toronto), Feb. 29, 1996, at A19 (discussing plight of gay man facing extradition to Mexico); Michael Valpy, *Should Canada Extradite Dennis Hurley to Mexico?*, GLOBE & MAIL (Toronto), Jan. 23, 1996, at A17 (same); see also *United States v. Bray* [1997] O.J. No. 645, ¶ 12 (Ont. C.A.) (Can.) (holding that concern for fugitive's safety in Kentucky did not compel exercise of Minister's discretion to refuse fugitive's extradition); *Brisson v. United States* [1994] 61 Q.A.C. 198, 204–05 (Que. C.A.) (Can.) (rejecting argument that extradition of fugitive to United States violates sections 7 or 12 of Charter).

stitutionally so) by Canadian standards<sup>17</sup> and extradition to face the possible imposition of the death penalty. The question of the application of section 12 of the Charter has arisen in both contexts.<sup>18</sup>

Canada is not alone in wrestling with the legality under domestic law of extraditing a fugitive to face a lengthy mandatory minimum sentence abroad; courts in other states have the same problem.<sup>19</sup> Individuals convicted of drug offenses in the United States, for example, typically face harsh prison sentences under federal or state law. The sentences are often long not only in comparison with the penalties for other offenses in the United States, but also relative to the sentences that a Canadian court would impose had the same crimes been committed in Canada. The issue has arisen repeatedly in Canadian courts because the United States—Canada's major extradition partner<sup>20</sup>—imposes the death penalty and mandatory minimum prison sentences at the federal level<sup>21</sup> and in many of the states.<sup>22</sup> By contrast, Canada aban-

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17. See *United States v. Johnson* [1997] O.J. No. 3778 (Ont. C.A.) (Can.) (noting that numerous cases have found no violation of fugitive's section 7 Charter rights in surrendering to face mandatory minimum sentences for any offense); *United States v. Dibben* [1996] A.Q. No. 1340 (Que. C.A.) (Can.), *leave to appeal refused*, [1996] 3 S.C.R. vii (Can.); see also *Guérin c. Canada (Ministre de la Justice)* [1996] R.J.Q. 1457 (Que. C.A.) (Can.) (ordering extradition to face 20-year mandatory minimum sentence for drug trafficking), *leave to appeal refused*, [1996] 3 S.C.R. ix (Can.); *United States v. Lombardo* [1996] 32 W.C.B.2d 171 (Que. C.A.) (Can.) (ordering extradition to face 20-year mandatory minimum sentence), *leave to appeal refused*, [1996] 3 S.C.R. x (Can.); *Zimmerman v. Canada (Minister of Justice)* [1995] 66 B.C.A.C. 137 (B.C. C.A.) (Can.) (ordering extradition to face 78–97-month sentence for wire fraud); *Zabartany c. Centre de Prévention de Parthenais* [1993] A.Q. No. 272 (Que. C.A.) (Can.) (holding section 7 objection to lengthy foreign sentence not pleaded); *Bouthillier v. Downs (Juge)* [1992] 51 Q.A.C. 31 (Que. C.A.) (Can.) (ordering extradition to face 10-year mandatory minimum sentence and large fine for possession of marijuana with intent to distribute); *Chouinard v. Downs (Juge)* [1992] 51 Q.A.C. 26 (Que. C.A.) (Can.) (ordering extradition to face minimum 10-year sentence and large fine for drug offenses); *Doyer v. Downs (Juge)* [1992] 51 Q.A.C. 1 (Que. C.A.) (Can.) (ordering extradition to face 20-year mandatory minimum sentence and large fine for marijuana offenses), *rev'd on other grounds sub nom. United States v. Doyer* [1993] 4 S.C.R. 497 (Can.); *United States v. Berladyn (No. 2)* [1992] 14 B.C.A.C. 304 (B.C. C.A.) (Can.) (ordering extradition of first-time offender to face 20-year prison sentence for property offenses); *États-Unis c. Tavormina* [1996] R.J.Q. 693 (Que. C.S.) (Can.) (ordering extradition to face 10-year minimum sentence in Florida for conspiracy to traffic in heroin, with no possibility of parole until 85% of sentence served), *aff'd on other grounds*, [1997] 112 C.C.C.3d 563 (Que. C.A.) (Can.).

18. The Charter states that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. See Charter § 12.

19. See Leon Sheleff, *The 'Penological Exception' to Extradition: On Ultimate Penalties, Human Rights and International Relations*, 27 ISR. L. REV. 310 (1993) (providing overview of how penological exception to extradition has been applied by various national courts); *Extradition of Murder Suspect Denied*, GLOBE & MAIL (Toronto), June 28, 1996, at A12 (discussing Italian court's refusal to allow extradition of fugitive to United States on murder charges without assurances that he would not face death penalty).

20. The vast majority of extradition requests made to Canada are from the United States. In the period 1985–91, the United States accounted for 361 of the 435 extradition requests (83%) that Canada received. See H.C. Debates, 34th Parl., 3d Sess., Nov. 7, 1991, at 4783 (statement of Mr. Ian Waddell).

21. At the federal level alone, there were at least 100 mandatory minimum penalty provisions in 1991. See *United States v. Spencer*, 25 F.3d 1105, 1112 (D.C. Cir. 1994) (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 5–15 (1991)).

doned the death penalty for all civilian offenses more than twenty years ago.<sup>23</sup> Indeed, the death penalty may even be unconstitutional in Canada.<sup>24</sup>

There are good reasons for regarding mandatory minimum sentences as an undesirable, counterproductive, and ultimately simplistic response to crime.<sup>25</sup> Yet these factors do not in themselves automatically present constitutional issues.<sup>26</sup> Mandatory minimum sentences give rise to two distinct objections, which are often conflated. The first is the sheer length of the sentences: They may appear to be disproportionate to their Canadian counterparts. The second is their mandatory minimum nature, which may limit or eliminate altogether the discretion of the sentencing judge in a manner that might be considered unconstitutional in Canada. The *Jamieson* cases, *Ross*, and *Whitley* examined whether extradition to a foreign state to face a mandatory minimum sentence for an offense committed there violates a fugitive's section 7 or section 12 Charter rights.

### 3. *What Degree of Constitutional Protection Should Be Accorded to Canadian Citizens in Extradition Cases?*

The third issue addressed in this Article is the impact of section 6(1) of the Charter upon the federal government's ability to surrender Canadian citizens for extradition.<sup>27</sup> On its face, section 6(1) protects the right of Canadian citizens to "remain in" Canada<sup>28</sup>—a guarantee that extradition appears to violate. Early Charter cases<sup>29</sup> held that the extradition of Canadian citizens

22. A number of other countries with which Canada has extradition treaties, such as Albania, Chile, Cuba, Guatemala, India, Liberia, Thailand, Tonga, and Yugoslavia (Serbia), also retain the death penalty.

23. See Criminal Amendment Act (No. 2), ch. 105, § 5, 1974–1976 S.C. 2130 (Can.). The death penalty remains on the books for certain military offenses under the National Defence Act, R.S.C., ch. N-5, §§ 73–76, 78–80 (1985) (Can.).

24. See *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 833 (Can.) (stating strong ground for believing that death penalty cannot be justified except in exceptional circumstances).

25. See TAMASAK WICHARAYA, *SIMPLE THEORY, HARD REALITY: THE IMPACT OF SENTENCING REFORMS ON COURTS, PRISONS, AND CRIME* 168–71 (1995); Vincent L. Broderick, *The Delusion of Mandatory Sentencing*, TRIAL, Aug. 1994, at 62. See generally LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* (1994) (arguing that harsh U.S. treatment of criminals has disastrous consequences). Whatever their penological unsoundness, such sentences are constitutional in the United States. See *Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding that state mandatory life sentence without possibility of parole for first-time drug possession is not cruel and unusual punishment under Eighth and Fourteenth Amendments).

26. This is not to say that certain mandatory minimum sentences cannot, in particular circumstances, infringe upon constitutional rights.

27. See J.G. Castel & Sharon A. Williams, *The Extradition of Canadian Citizens and Sections 1 and 6(1) of the Canadian Charter of Rights and Freedoms*, 25 CAN. Y.B. INT'L L. 263 (1987) (arguing that section 6 of Charter does not enable fugitives to resist extradition).

28. Charter § 6(1) ("Every citizen of Canada has the right to enter, remain in and leave Canada.").

29. See, e.g., *In re Voss & The Queen* [1984] 12 C.C.C.3d 538 (B.C. C.A.) (Can.); *In re Federal Republic of Germany & Rauca* [1983] 4 C.C.C.3d 385 (Ont. C.A.) (Can.); *United States v. Swystun* [1987] 50 Man. R.2d 129, 133–34 (Man. Q.B.) (Can.); *In re Decter & United States* [1983] 5 C.C.C.3d 364 (N.S. S.C.T.D.) (Can.).

violated section 6(1) but upheld those violations under section 1.<sup>30</sup> Justice La Forest accordingly held for the majority of the Supreme Court of Canada in the leading case, *United States v. Cotroni*, although he conceded that under certain circumstances, section 1 would not trump section 6(1).<sup>31</sup> In *United States v. Burns*, the British Columbia Court of Appeal forced the issue to a head by ruling that the extradition of a Canadian to face the death penalty violates section 6(1) and cannot be upheld under section 1.<sup>32</sup>

Questions remain as to the proper scope of the government's obligation to pursue charges against a fugitive in Canada, rather than surrender the fugitive for extradition to face charges abroad. Whether a fugitive's Canadian citizenship should affect this decision is similarly unclear. Finally, the appropriate scope of review of prosecutorial discretion to stay or decline to bring proceedings in favor of a fugitive's surrender to face charges abroad remains uncertain. As *Ross*, *Whitley*, and *Leon* indicate, these questions are contentious, and the Supreme Court's recent decisions have done little to resolve the uncertainty.

### C. Overview

This Article argues that the appropriate standard of review of ministerial surrender decisions under section 7 of the Charter is one that properly balances the rights of fugitives with the needs of the international community and with Canada's interest in a functional and efficient system of international extradition. Application to extradition of Charter norms according to strict domestic standards would be unworkable. The standard of review must be at once true to constitutional principles and sensitive to the particular international context of extradition. This standard of review, the "residual threshold standard," is generally deferential to ministerial surrender decisions, yet gives the courts the residual power to intervene in order to protect fugitives in compelling situations.

This Article argues that in applying the residual threshold standard of review, Canadian courts should look to the basic standards of international human rights law as guidelines in setting out the threshold for intervention under domestic law. Unincorporated treaties and customary norms may be used to help interpret broad domestic constitutional guarantees, such as those contained in sections 7 and 12 of the Charter. In this way, Canadian courts can insist that fugitives be treated in accordance with international standards

30. Charter § 1 ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

31. See *United States v. Cotroni* [1989] 1 S.C.R. 1469, 1498 (Can.); see also *Great Britain v. Taylor* (No. 2) [1990] O.J. No. 2015, 62-63 (Ont. Gen. Div.) (Can.) (finding that rendition of Canadian citizen under Fugitive Offenders Act violates section 6(1) of Charter but upholding rendition under section 1).

32. See *United States v. Burns* [1997] 116 C.C.C.3d 524, 533-36 (B.C. C.A.) (Can.).



and avoid the pitfalls associated with the imposition of a domestic standard of review upon foreign legal systems.

In the context of foreign mandatory minimum sentences, a residual threshold approach allows courts to accord a certain leeway (or “margin of appreciation”) to foreign sentencing legislation and decisionmaking. International human rights law has relatively little to say about sentencing decisions, but the idea that Canadian courts should intervene only in clear cases should play an important role. Rather than focusing on the absolute length of foreign sentences, Canadian courts should take into account that in general, foreign courts consider the same range of factors that inform domestic sentencing decisions. Given that foreign sentences may differ from Canadian sentences for a number of valid reasons, Canadian courts should not be too quick to quash ministerial surrender decisions when the fugitive faces a foreign sentence that appears lengthy by domestic standards. In cases where the foreign sentence is overwhelmingly disproportionate, however, judicial intervention may become a constitutional necessity, but such cases will be few. Judicial review in such circumstances is bound to be impressionistic, so the courts’ mindset is of central importance.

The other primary issue addressed in this Article is the proper role of section 6(1) of the Charter in extradition cases where the fugitive is a Canadian citizen. To date, the Supreme Court of Canada has accorded the section 6(1) Charter right relatively little weight in its extradition decisions and has upheld all violations of section 6(1) of the Charter under section 1. The British Columbia Court of Appeal’s recent decision in *Burns* places considerable (and, arguably, undue) weight on section 6(1). The court’s reasoning in *Burns* is faulty because it is based on a misinterpretation of the existing jurisprudence of the Supreme Court of Canada and, more importantly, on a misunderstanding of the principles underlying that jurisprudence. The Supreme Court would do well to respond with a more explicit section 1 argument in extradition cases. As it stands, the values underlying section 6(1) have been given insufficient consideration in the balancing of interests under section 1. That said, the argument that the effect of section 6(1), or that the combined effect of section 6 and section 7, is to mandate the introduction of a nationality-based prescriptive jurisdiction for Canadian citizens in extradition cases is weak and should be rejected.

The best opportunity to give a more prominent role to section 6(1) is in transnational offense cases, where the offense has connections with more than one state, resulting in the possibility that the fugitive will be charged with a crime in both Canada and the requesting state. In such cases, section 6(1) of the Charter should hold Canadian authorities to a test modeled on the civil forum non conveniens doctrine, which would require that they justify their choice to extradite the fugitive rather than institute charges against him or her in Canada.

## II. STANDARDS OF REVIEW

### A. *Constitutional Judicial Review of the Surrender Decision*

In determining the nature and scope of judicial review of ministerial surrender decisions in extradition cases under the Charter, several preliminary concerns must be addressed. The cases considered in this Article all involve attempts to challenge decisions of the Minister of Justice to surrender fugitives for extradition. These challenges have been grounded in sections 1, 6, 7, and 12 of the Charter, which is the supreme law of Canada. Acts by public authorities that violate Charter provisions are invalid.<sup>33</sup>

A cornerstone of this Article's thesis is that extradition's essentially transnational nature influences the manner in which it should be subjected to judicial review. Although the Charter does not apply to the actions of foreign governments,<sup>34</sup> it does apply, at least in part, to domestic extradition proceedings.<sup>35</sup> Because the extradition process involves cooperation between Canada and foreign states, there is lingering uncertainty as to the scope of the Charter's applicability to it.

Extradition is quasi-criminal in nature; a committal hearing is a civil proceeding that determines whether a fugitive should be sent to a foreign state to face criminal proceedings or imprisonment, but it is not a criminal trial.<sup>36</sup> No determination of guilt is made by the extraditing state.<sup>37</sup> Accordingly, extradition is very much *sui generis*,<sup>38</sup> as a civil proceeding with potentially criminal consequences. Therefore, the full procedural protections of a criminal trial do not apply.<sup>39</sup>

33. See Charter § 52(1)-(2).

34. See *R. v. Terry* [1996] 2 S.C.R. 207, 215-17 (Can.); *R. v. Harrer* [1995] 3 S.C.R. 562, 570 (Can.); *R. v. Schmidt* [1987] 1 S.C.R. 500, 518 (Can.).

35. See *Idziak v. Canada* (Minister of Justice) [1992] 3 S.C.R. 631, 654-56 (Can.); *Schmidt* [1987] 1 S.C.R. at 520-22.

36. Extradition is, however, a "criminal matter" for federalism purposes. See *Saxena v. Thailand* (Kingdom) [1997] 116 C.C.C.3d 398, 406 (B.C. C.A.) (Can.) (determining that province is constitutionally unable to provide appeal route in extradition cases).

37. The determination of guilt or innocence is made by the court in the foreign state. See *United States v. Wagner* [1995] 104 C.C.C.3d 66, 75 (B.C. C.A.) (Can.); *St.-Gelais v. United States* [1994] 62 Q.A.C. 287, 293 (Que. C.A.) (Can.); *Philippines (Republic) v. Pacificador* [1993] 14 O.R.3d 321, 333 (Ont. C.A.) (Can.).

38. But see *R. v. Governor of Brixton Prison* [1997] 3 W.L.R. 117, 121 (H.L.) (Eng.) (appeal taken from Eng.) (stating that extradition proceedings are criminal proceedings rather than *sui generis*).

39. See *United States v. Dynar* [1997] 115 C.C.C.3d 481, 523-25 (Can.) (establishing no right to full Crown disclosure at committal hearing); *Waddell v. Canada* [1996] 33 W.C.B.2d 20 (B.C. C.A.) (Can.) (finding no right to jury trial at extradition hearing); *Roumania (State) v. Cheng* [1996] 32 W.C.B.2d 128 (N.S. S.C.) (Can.) (stating that Crown duty of disclosure is narrower in extradition hearings than in criminal trials); *United States v. Ngai* [1995] O.J. No. 3625 (Ont. Gen. Div.) (Can.) (determining that there is no right to cross-examine affiants). The distinction in procedural protections afforded an accused at a preliminary inquiry and a fugitive at an extradition hearing does not violate section 15 of the Charter. See *United States v. Kerslake* [1996] 142 Sask. R. 112, 130 (Sask. Q.B.) (Can.).

The first stage of extradition, judicial in nature, consists of an application for a warrant of committal.<sup>40</sup> Although the Charter guarantees the fairness of a committal hearing,<sup>41</sup> the role of the extradition judge is necessarily limited.<sup>42</sup> At this early stage, the extradition judge need only determine whether there is a *prima facie* case that the fugitive has committed an extradition crime.<sup>43</sup> This is accomplished by examining whether sufficient evidence exists to justify the committal of the fugitive for trial in Canada, if the offense had been committed in Canada.<sup>44</sup> This standard is similar to that utilized at a preliminary inquiry. Defenses that may be raised at the foreign trial will not be entertained at the extradition hearing.<sup>45</sup>

If a warrant for committal is issued at the first stage, the fugitive may appeal to the court of appeal.<sup>46</sup> If the appeal is unsuccessful, the second stage of extradition is reached.<sup>47</sup> At this political stage, the Minister of Justice must determine whether to surrender the fugitive for extradition abroad.<sup>48</sup> The fugitive may make representations to the Minister giving reasons for refusing surrender.<sup>49</sup> If the Minister decides to surrender the fugitive for extradition, the fugitive may seek judicial review of the ministerial surrender decision by the court of appeal in the province in which the fugitive has been committed for surrender.<sup>50</sup>

The precise jurisdiction of an extradition judge at the first stage has given rise to controversy, particularly with regard to Charter remedies. Initially, the courts held that Charter challenges based on the treatment that the fugitive would face abroad were premature at the first stage and that such challenges should be brought only after the ministerial surrender decision

40. This application is brought by the federal government on behalf of the requesting state. The diplomatic note making the request need not be filed with the court. See *In re von Einem & Federal Republic of Germany* [1984] 14 C.C.C.3d 440, 443 (B.C. C.A.) (Can.).

41. See *Dynar* [1997] 115 C.C.C.3d at 522.

42. See *United States v. Whitley* [1994] 119 D.L.R.4th 693, 699-700 (Ont. C.A.) (Can.) (following *R. v. Schmidt* [1987] 1 S.C.R. 500 (Can.)), *aff'd*, [1996] 1 S.C.R. 467 (Can.).

43. See *Argentina v. Mellino* [1987] 1 S.C.R. 536, 553 (Can.).

44. See *Extradition Act*, R.S.C., ch. E-23, § 18(1)(a) (1985) (Can.); *United States v. Lépine* [1994] 1 S.C.R. 286, 296 (Can.); *In re McVey* [1992] 3 S.C.R. 475, 514 (Can.); see also *Philippines (Republic) v. Pacificador* [1993] 14 O.R.3d 321, 333 (Ont. C.A.) (Can.) (holding that evidentiary standard set by *Extradition Act* § 18(1)(b) is constitutionally sufficient).

45. See *United States v. Allard* [1987] 1 S.C.R. 564, 571-72 (Can.); *Mellino* [1987] 1 S.C.R. at 558-59; *Schmidt* [1987] 1 S.C.R. at 516.

46. See *Extradition Act* § 19.2 (Can.). On a matter of public importance, further appeal lies (with leave) to the Supreme Court of Canada. See *Supreme Court Act*, R.S.C., ch. S-26, § 40(1) (1985) (Can.).

47. See, e.g., *Idziak v. Canada (Minister of Justice)* [1992] 3 S.C.R. 631, 654-56 (Can.); *McVey* [1992] 3 S.C.R. at 519.

48. See *Extradition Act* § 25(1) (Can.).

49. See *id.* § 19.1(1). The fugitive may not seek an extension of time for this purpose; the proper route is to attack the ministerial surrender order itself. See *Reid v. Canada (Minister of Justice)* [1995] 82 O.A.C. 59, 62 (Ont. C.A.) (Can.).

50. See *Extradition Act* § 25.2(1) (Can.). The Federal Court of Canada no longer has jurisdiction to hear applications for judicial review of ministerial surrender decisions. See *Garcia v. Canada (Minister of Justice)* [1997] F.C.J. No. 453 (Fed. Ct. T.D.) (Can.).

had been made.<sup>51</sup> Similarly, extradition judges were held not to have competent jurisdiction for the purpose of ordering Charter remedies.<sup>52</sup> Amendments to the Extradition Act suggest, however, that extradition judges at the first stage may fashion Charter remedies, exclude evidence, stay proceedings, and hear evidence on anticipated breaches of the Charter.<sup>53</sup> In addition, the court of appeal may defer the hearing of an appeal from the extradition judge's decision until the Minister has made a surrender decision,<sup>54</sup> resulting in a hearing that is simultaneously the appeal and judicial review of the ministerial surrender decision. This is in keeping with the view that the role of the extradition judge is to "protect the fundamental rights of the fugitive."<sup>55</sup> Nevertheless, the Charter protection afforded to a fugitive at a committal hearing will not necessarily equal that available at a criminal trial.<sup>56</sup>

With this background, we may turn now to the central question under consideration, namely, the determination of the appropriate standard of review of ministerial surrender decisions in extradition cases. The Supreme Court of Canada has said since *Operation Dismantle v. R.* that the exercise

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51. See *United States v. Garcia* [1994] O.J. No. 1027, ¶ 45 (Ont. Gen. Div.) (Can.) (holding that Charter challenge must await ministerial surrender decision), *appeal dismissed*, [1996] 31 W.C.B.2d 458 (Ont. C.A.) (Can.), *leave to appeal refused*, [1997] 34 W.C.B.2d v (Can.); cf. *United States v. Houslander* [1993] 13 O.R.3d 44, 51-53 (Ont. Gen. Div.) (Can.) (stating that fugitive may not use hearing before extradition judge to "create a record" for eventual Charter challenge of anticipated ministerial surrender decision).

52. See *United States v. Legros* [1992] 77 C.C.C.3d 353, 364 (N.S. T.D.) (Can.). But see *United States v. Turner* [1992] 75 C.C.C.3d 150, 160-61 (Ont. Gen. Div.) (Can.) (holding that extradition judge may invoke Charter remedies).

53. See Extradition Act § 9(3) (Can.); *United States v. Dynar* [1997] 115 C.C.C.3d 481, 528-29 (Can.) (observing that extradition judge at committal hearing is "court of competent jurisdiction" for purposes of section 24 of Charter); see also *United States v. Burns* [1997] 116 C.C.C.3d 524, 546 (B.C. C.A.) (Can.) (holding that judge at committal hearing can order Charter remedies); *United States v. Cazzetta* [1996] 108 C.C.C.3d 536, 543-46 (Que. C.A.) (Can.) (holding that section 9(3) of Extradition Act endows extradition judge with jurisdiction to order Charter remedies), *leave to appeal refused*, [1996] 3 S.C.R. xiv (Can.); *India v. Singh* [1996] 108 C.C.C.3d 274, 284 (B.C. S.C.) (Can.) (deeming evidence obtained by torture in requesting state to be inadmissible in extradition hearing); *United States v. Tilley* [1996] 183 A.R. 158, 159-60 (Alta. Q.B.) (Can.) (allowing fugitive to call evidence of alleged Charter breaches in anticipation of ministerial surrender decision); *United States v. Cobb* [1997] O.J. No. 4362, ¶¶ 20-23 (Ont. Ct. Gen. Div.) (Can.) (concluding that section 24 of Charter provides extradition judge with jurisdiction to hear Charter claims); cf. Paul Mitchell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 479 (1996) (arguing for jurisdiction to control abuse of process in extradition proceedings). But see *United States v. D'Agostino* [1997] 41 C.R.R.2d 325, 337-39 (Ont. Gen. Div.) (Can.) (adopting more restrictive scope to extradition judge's jurisdiction to grant Charter relief conferred by section 9(3) of Canadian Extradition Act).

54. See Extradition Act § 19.4(2) (Can.); see also *id.* § 19.9 (allowing Supreme Court of Canada to defer appeal until after ministerial surrender decision).

55. *United States v. Manno* [1997] 112 C.C.C.3d 544, 561 (Que. C.A.) (Can.), *leave to appeal refused*, [1997] 115 C.C.C.3d (Can.); see also *United States v. Burns* [1997] 116 C.C.C.3d 524, 546 (B.C. C.A.) (Can.) (arguing that having committal judge determine Charter issues before ministerial surrender decision would ensure that initial reviewable determination of fugitive's Charter rights would be made by judicial body rather than non-judicial minister).

56. See cases cited *supra* note 39.

of executive discretion is never beyond judicial review.<sup>57</sup> It is also well known, however, that the appropriate standard of judicial review of the exercise of executive discretion varies with the particular context at issue.<sup>58</sup> Why does the extradition context lead to a standard of review other than the usual domestic standard of review? The Supreme Court of Canada has indicated that although the courts are to play a supervisory role to ensure executive compliance with constitutional dictates,<sup>59</sup> they also should show deference to the executive in the realm of extradition, is connected both to Canada's international treaty obligations and to the conduct of foreign affairs.<sup>60</sup> Upholding the rights of fugitives while maintaining an effective international extradition system is a delicate task. Precisely how that balance is to be achieved under Canadian law is not yet clear.

## B. Section 7, Fundamental Justice, and Standards of Review

### 1. Introduction: Section 7 Review

The ministerial surrender decision in Canada undoubtedly affects a fugitive's "life, liberty and security of the person."<sup>61</sup> Accordingly, the decision must be made "in accordance with the principles of fundamental justice"<sup>62</sup>; otherwise, it will violate section 7 of the Charter. Section 7 rights are accorded to "everyone," which includes foreign citizens as well as Canadian citizens, so citizenship per se has no relevance to section 7 review.<sup>63</sup> In the cases recently before the Supreme Court of Canada, the fugitives argued that their committal<sup>64</sup> or surrender<sup>65</sup> for extradition to face a foreign mandatory minimum sentencing regime would violate their section 7 rights. In the decisions finding no section 7 violation,<sup>66</sup> the Court held that judicial intervention would be appropriate only in extreme circumstances, such as where surren-

57. See *Operation Dismantle v. R.* [1985] 1 S.C.R. 441 (Can.), cited in *R. v. Schmidt* [1987] 1 S.C.R. 500, 521-22 (Can.).

58. See *Chiarelli v. Canada (M.E.I.)* [1992] 1 S.C.R. 711, 732 (Can.) (citing *R. v. Wholesale Travel Group* [1991] 3 S.C.R. 154 (Can.)); see also *Michaud v. Quebec (Attorney General)* [1996] 3 S.C.R. 3, 45 (Can.) (stating that meaning and content of Charter rights vary with context).

59. See *Jamieson II* [1994] 93 C.C.C.3d 265, 277 (Que. C.A.) (Can.), *rev'd*, [1996] 1 S.C.R. 465 (Can.); *Jamieson I* [1992] 73 C.C.C.3d 460, 466-67 (Que. C.A.) (Can.).

60. See *Argentina v. Mellino* [1987] 1 S.C.R. 536, 551 (Can.).

61. Charter § 7.

62. *Id.*

63. See *infra* Subsection IV.B.2, however, for an evaluation of the argument that section 6 and section 7 of the Charter have the combined effect of barring the extradition of Canadian citizens in certain situations.

64. See *Jamieson I* [1992] 73 C.C.C.3d at 465.

65. See *United States v. Ross* [1994] 119 D.L.R.4th 333, 341-42 (B.C. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 469 (Can.); *United States v. Whitley* [1994] 119 D.L.R.4th 693, 697 (Ont. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 467 (Can.); *Jamieson II* [1994] 93 C.C.C.3d at 277 (Que. C.A.) (Can.), *rev'd*, [1996] 1 S.C.R. 465 (Can.).

66. See *Ross* [1994] 119 D.L.R.4th at 367-73; *Whitley* [1994] 119 D.L.R.4th at 702-13; *Jamieson I* [1992] 73 C.C.C.3d at 465-69.

der would expose the fugitive to an unjust or oppressive foreign punishment or procedure. The Court held that in most cases the extradition process accords with the principles of fundamental justice. The main bulwark protecting fugitives' rights is the Minister's broad discretion to refuse to surrender fugitives for extradition.<sup>67</sup> Judicial review offers residual protection to fugitives.

In exercising judicial review of ministerial surrender decisions under section 7 of the Charter, courts must consider the punishment that the fugitive likely will receive in the requesting state. With this in mind, the courts must determine whether surrender of the fugitive for extradition to face such punishment would deprive him or her of the right to life, liberty or security of the person, and, if it would, whether the deprivation would accord with the principles of fundamental justice. For the most part, courts have assumed that section 1 plays a negligible role in section 7 cases; the Supreme Court, for example, has often stated that it would be only in the most unusual circumstances that a section 7 violation could be upheld under section 1.<sup>68</sup> Accordingly, a conventional analysis suggests that a fugitive's case stands or falls under section 7.

This Article argues that the balancing of social and individual interests inherent in the surrender of a fugitive for extradition is better considered under section 1, so that an argument based upon the international public interest can be given proper weight. Consequently, there is reason to doubt the Supreme Court of Canada's view that section 7 violations can never be upheld under section 1.<sup>69</sup> Indeed, the Court's view has had the regrettable effect of transferring almost all of the balancing of individual and societal interests to section 7, under which the individual bears the burden of proving a Charter violation.<sup>70</sup> More of the balancing exercise should take place under section 1, so that the government bears the onus of demonstrating that a

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67. See Extradition Act, R.S.C., ch. E-23, § 22 (1985) (Can.); see also *Brisson v. United States* [1994] 61 Q.A.C. 198, 205 (Que. C.A.) (Can.) (distinguishing between committal order and ministerial surrender decision). Although the federal government acts as counsel for the requesting state in the judicial stage of the extradition process and then exercises the discretion as to whether to surrender the fugitive for extradition, there is no conflict of interest. See *Idziak v. Canada* (Minister of Justice) [1992] 3 S.C.R. 631, 657-60 (Can.) (holding that dual role of Minister does not lead to institutional bias in extradition process). But see *United States v. Burns* [1997] 116 C.C.C.3d 524, 544 (B.C. C.A.) (Can.) (suggesting that because Minister's department has "assumed responsibility for the conduct of extradition proceedings" on behalf of requesting state, Minister is not "independent and impartial tribunal" for determination of fugitive's Charter rights).

68. See *In re B.C. Motor Vehicle Reference* [1985] 2 S.C.R. 486, 518 (Can.) (stating that section 7 violation can be upheld under section 1 only in "exceptional conditions"); see also *id.* at 523-24 (stating that section 7 violation cannot be upheld under section 1). But see *R. v. Hess* [1990] 2 S.C.R. 906, 917-27 (Can.) (undertaking section 1 analysis for section 7 violation).

69. But see David J. Mullan, *The Impact of the Charter on Administrative Procedure: The Meaning of Fundamental Justice*, in THE 1990 ISAAC PITBLADO LECTURES, PUBLIC INTEREST V. PRIVATE RIGHTS: STRIKING THE BALANCE IN ADMINISTRATIVE LAW 29, 53 (1990) ("[T]here is no place for s. 1 arguments when s. 7 has been violated.").

70. See, e.g., *R. v. Penno* [1990] 2 S.C.R. 865, 894 (Can.) (holding that "principles of fundamental justice" under section 7 encompass both interests of individual and those of public).

prima facie violation of a Charter right should be upheld as a reasonable limitation upon that right.<sup>71</sup> That said, the arguments advanced in this Article apply regardless of whether the balancing of individual and societal interests takes place under section 1 or section 7.

There are three possible standards of review of ministerial surrender decisions in extradition cases: the non-inquiry standard, the domestic threshold standard, and the residual threshold standard.<sup>72</sup> This Article demonstrates that the Supreme Court of Canada essentially has adopted a version of the residual threshold standard of review. It then examines the jurisprudence of the European Court of Human Rights and the push towards a domestic threshold standard of review in extradition cases that it has inspired. The Article argues that the Supreme Court was correct to adopt a version of the residual threshold standard and that the domestic threshold standard, though initially attractive, is unworkable in practice. The residual threshold standard best achieves the appropriate balance between the public interest in an effective extradition system and the rights of fugitives. Finally, the Article suggests that the Supreme Court's version of the residual threshold standard of review must be fleshed out to render it coherent and capable of addressing the challenges contained in new cases.

## 2. *The Supreme Court of Canada's Standard of Review in Extradition Cases*

The leading case on the relationship of section 7 of the Charter to the extradition process is *R. v. Schmidt*.<sup>73</sup> A Canadian citizen challenged her surrender for extradition to Ohio to face state child stealing charges by arguing that she already had been acquitted of kidnapping under U.S. federal law for the same offense. She claimed that her surrender for extradition would violate sections 7 and 11(h)<sup>74</sup> of the Charter, even though a double jeopardy plea was unavailable to her under Ohio law. The Supreme Court dismissed her challenge. In reviewing the ministerial surrender decision, Justice La Forest held that courts should look to the treatment that the fugitive is likely to face in the requesting state and intervene only when this treatment would violate the principles of fundamental justice. Torture was cited as an example of

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71. See Dennis Klinck, *The Charter and Substantive Criminal "Justice"*, 42 U.N.B. L.J. 191 (1993) (discussing relationship between section 7 and section 1 of Charter); Thomas J. Singleton, *The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter*, 74 CAN. B. REV. 446, 472-73 (1995).

72. See Tracey Hughes, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B.C. INT'L & COMP. L. REV. 293, 312-20 (1986).

73. [1987] 1 S.C.R. 500 (Can.).

74. According to section 11 of the Charter, "any person charged with an offence has the right . . . if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again." Charter § 11(h).

treatment that would trigger an order to quash a ministerial surrender decision.<sup>75</sup> Yet Justice La Forest wrote:

Situations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7.<sup>76</sup>

Regrettably, however, Justice La Forest's opinion was Delphic as to how to identify the situations in which the court would intervene, although he did emphasize that a court must look to the foreign legal system as a whole: Canadian courts must not quash a surrender decision merely because the criminal justice system in the requesting state does not provide the same procedural protections accorded to criminal defendants in Canada. Justice La Forest suggested that even the absence of the presumption of innocence, long considered an essential constitutional guarantee in Canadian criminal trials, would not render the requesting state's legal system objectionable as long as it could be considered just overall.<sup>77</sup> Justice La Forest's reasons suggest that the executive is best positioned to make decisions about the "general fairness" of foreign legal systems (for example, by entering into or terminating treaties and by exercising the discretion not to surrender a fugitive for extradition) and that it would be an unusual case in which the courts would intervene in such a decision.

### 3. Soering's Legacy

No consideration of the appropriate standard of review of ministerial surrender decisions in extradition cases is complete without an account of the importance of the decision of the European Court of Human Rights in *Soering v. United Kingdom*.<sup>78</sup> In *Soering*, a West German citizen successfully resisted extradition from the United Kingdom to Virginia, where he faced trial on charges of murder and the possible imposition of the death sentence if convicted. He did so on the grounds that the so-called "death row phenomenon"—the lengthy period of detention on death row and the accompanying mental anguish in anticipation of execution—was prohibited by article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>79</sup> The European Court based its decision on the principle

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75. The United Nations Human Rights Committee held similarly in *Kindler v. Canada*, Decision of July 30, 1993, Concerning Comm. No. 470/1991, ¶ 6.2, reprinted in 14 HUM. RTS. L.J. 307, 309 (1993).

76. *Schmidt* [1987] 1 S.C.R. at 522.

77. See *id.* at 522-23; see also *Thomson Newspapers Ltd. v. Director of Investigation & Research* [1990] 1 S.C.R. 425, 583 (Can.) ("Fundamental justice may take different forms in different societies, given their own legal traditions.").

78. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

79. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention]



that state responsibility attached to actions by parties to the European Convention that resulted in or facilitated the violation of rights guaranteed under it.<sup>80</sup> This was so even though the treatment or punishment would come at the hands of the government of the State of Virginia (obviously not a party to the European Convention), not the United Kingdom. As long as substantial grounds existed for believing that the treatment or punishment would be imposed upon the individual, a Convention state could neither extradite nor deport him or her.<sup>81</sup>

The revolutionary element of *Soering* was the European Court's re-fashioning of the relationship between extradition law, human rights law, and state responsibility.<sup>82</sup> The European Court held that Convention states must ensure that the rights of all individuals subject to their jurisdiction, including fugitives facing extradition abroad, are protected, even where—perhaps *especially* where—the requesting country is not a Convention state. National courts must ensure that the human rights obligations of their states are satisfied in the extradition context, and courts must refuse to allow extradition where fugitives face a “real risk” of being subjected to cruel and inhuman treatment (as defined by the Convention) in the requesting state. Important decisions of the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR)<sup>83</sup> and its Optional Protocol<sup>84</sup> subsequently have adopted *Soering*'s logic on this point.<sup>85</sup>

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(“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”). On article 3 jurisprudence more generally, see Antonio Cassese, *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 225 (R. St. J. Macdonald et al. eds., 1993).

80. State responsibility is, in essence, the attribution of liability to a state in international law for wrongful acts or omissions. In the human rights context, a state is said to bear responsibility where its officials or agents have acted or failed to act in such a way as to attract liability. See generally IAN BROWNLEE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I* (1983) (providing overview of general principles of state responsibility by considering both legal principles and state practices).

81. See Michael O'Boyle, *Extradition and Expulsion Under the European Convention on Human Rights: Reflections on the Soering Case*, in *HUMAN RIGHTS AND CONSTITUTIONAL LAW* 93, 99 (James O'Reilly ed., 1992).

82. The European Court of Human Rights subsequently extended the interpretation of article 3 adopted in *Soering* to expulsion and deportation cases. See *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, ¶¶ 74, 79–80 (1997) (Eur. Ct. H.R.) (holding that expulsion of Sikh separatist to India violated article 3 given substantial evidence that he would be tortured); *Ahmed v. Austria*, 24 Eur. H.R. Rep. 278, ¶¶ 39–41 (1996) (Eur. Ct. H.R.) (holding that expulsion of Somali to Somalia would expose him to serious risk of torture or inhuman or degrading treatment contrary to article 3). But see *Cruz Varas v. Sweden*, App. No. 15576/89, 14 Eur. H.R. Rep. (ser. A) 1, ¶ 70 (1991) (Eur. Ct. H.R.) (finding that deportation to face possible persecution in Chile on account of political activities there did not breach article 3 of Convention).

83. U.N. GAOR 3d Comm., 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

84. *Id.* at 59.

85. See *Cox v. Canada*, Decision of Oct. 31, 1994, Concerning Comm. No. 539/1993, ¶ 16.1, reprinted in 15 HUM. RTS. L.J. 410, 416 (1994); *Ng v. Canada*, Decision of Nov. 5, 1993, Concerning Comm. No. 469/1991, ¶ 14.2, reprinted in 15 HUM. RTS. L.J. 149, 156 (1994); *Kindler v. Canada*, Decision of July 30, 1993, Concerning Comm. No. 470/1991, ¶¶ 6.2, 13.2, reprinted in 14 HUM. RTS. L.J. 307, 309 (1993).

Despite the importance of *Soering*'s new conception of state responsibility, the decision's virtues must be distinguished from its vices. First, the European Court did *not* decide that extradition to face the death penalty per se violated the fugitive's Convention rights.<sup>86</sup> Rather, it was the probable exposure of the fugitive to the "death row phenomenon" that troubled the *Soering* Court. By relying upon the "death row phenomenon" as the basis for its decision, the Court reached the paradoxical result that the procedural protections accorded a fugitive in the requesting state were deemed to be the source of "inhuman or degrading treatment or punishment." By implication, if the requesting state were to prune back stays and rights of appeal and execute death row prisoners more quickly, article 3 would not have been breached.<sup>87</sup> Thus, although a court must examine the treatment or punishment that the fugitive likely would face abroad, it is not clear that the "death row syndrome" itself (or at least the version outlined in *Soering*) necessarily would provide grounds to quash a ministerial surrender decision.<sup>88</sup>

Crucially, the force of the European Court's pronouncements on the relationship among extradition, human rights, and state responsibility also was qualified by the fact that Germany, another Convention state, actively sought the fugitive's extradition from the United Kingdom so that he could be prosecuted for murder in Germany on the basis of nationality jurisdiction. The fugitive would not have faced the death sentence in Germany. In fact, the *Soering* Court was not forced to make a stark choice between extradition or allowing the fugitive to walk free. If it had been, the case might have been resolved differently.<sup>89</sup> As it stands, the factual context of *Soering* seems to undermine the Court's rather sweeping pronouncements.

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86. *But see* David Beatty, *The Canadian Charter of Rights: Lessons and Laments*, 60 MOD. L. REV. 481, 489, 495 (1997) (implying that *Soering* recognized right not to be extradited to countries that retain the death penalty). Beatty's suggestion is simply incorrect. Professor William Schabas acknowledges that the Court in *Soering* "stopped short of holding the death penalty itself to be inhuman and degrading . . ." William A. Schabas, *Soering's Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk Down Death Row*, 43 INT'L & COMP. L.Q. 913, 914 (1994).

87. A similar criticism was made by Justice La Forest in *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 838 (Can.) (discussing extradition of U.S. citizen to face death penalty in Pennsylvania); *see also* *Guerra v. Baptiste* [1996] 1 App. Cas. 397 (P.C.) (appeal taken from Jam.) (stating that if death sentence is to be imposed, it should follow as soon as possible after sentencing, with appropriate allowances for appeals or reprieve).

88. This is not to suggest that the conditions that a fugitive would face on death row could *never* give rise to human rights concerns. On the death row syndrome in the United States, see Daniel P. Blank, Book Note, *Mumia Abu-Jamal and the 'Death Row Phenomenon'*, 48 STAN. L. REV. 1625 (1996).

89. *See Kindler* ¶ 15.3, reprinted in 14 HUM. RTS. L.J. 307, 314 (1993). The European Court did give great weight to the safe haven argument and the international public interest argument; on different facts, these considerations might have carried the day. *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 89, at 35 (1989). It should be noted that the *Soering* Court was influenced by somewhat exceptional extenuating circumstances, including the fugitive's relative youth (18 years old at the time of the offense) and mental condition (he was allegedly suffering from an "abnormality of mind")—factors that might be taken into account even by courts operating under a non-inquiry or residual threshold standard. *See id.* ¶ 108. These complicating factors prevent *Soering* from providing a clear example of the application of the domestic threshold standard of review. In the end, the Virginia authorities provided assurances to the British government that they would not seek the death penalty, and the fugitive was extradited to the

What *Soering* does demonstrate is that there are three main elements that should influence the development of rules governing the scope of judicial review of ministerial decisions to surrender fugitives for extradition to foreign states. The three elements—domestic constitutional standards, international human rights law, and the law of state responsibility—are linked: An extraditing state is under international human rights obligations, and it breaches these obligations (and engages state responsibility under international law) when a fugitive is extradited to a state that is likely to impose a punishment violating those international human rights standards. Of course, *Soering* was a case concerning the European Convention on Human Rights and technically applies only to Convention states. Its logic, however, extends to more general international human rights obligations as well.

The final consideration is that the interpretation of domestic constitutional standards should be informed by the combination of international human rights standards and an awareness of the consequences that will arise for state responsibility should these international obligations be violated. International human rights law binds Canada on the international plane. It is not enforceable directly in domestic courts in the absence of implementing legislation. Nonetheless, where possible, domestic law should be interpreted to accord with international human rights law standards, particularly where the applicable domestic constitutional provisions—sections 7 and 12 of the Charter—are open-textured. Thus, by following international human rights law standards, a domestic court both will satisfy domestic constitutional standards in the extradition context and ensure that the state will not incur responsibility for violation of international human rights obligations by sending a fugitive abroad in circumstances in which it is reasonably foreseeable that the fugitive will be subjected to objectionable treatment in the requesting state.

#### 4. *The Non-Inquiry Standard*

The first possible alternative to the residual threshold standard of review is a “non-inquiry” standard, which contemplates a narrowly circumscribed role for courts in the extradition process. Under such a standard, Canadian courts would be highly deferential to the executive and would not examine the nature of the foreign criminal justice system or the treatment that the fugitive likely would face in the requesting state, considering this type of inquiry to be a matter for ministerial discretion rather than judicial intervention. The non-inquiry standard was the traditional pre-Charter approach of

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United States, where he was convicted of murder and sentenced to two life terms of imprisonment. See Ian Ball & Wendy Holden, *Shakespeare Lovers in Murder Most Foul: Envoy's Son Guilty of Macbeth Killings*, DAILY TELEGRAPH (London), June 26, 1990, at 3; Hugh Davies, *Life Sentence for Killer Son of Diplomat*, DAILY TELEGRAPH (London), Sept. 6, 1990, at 3.

the Canadian courts in extradition matters,<sup>90</sup> and it continues to be applied by English<sup>91</sup> and U.S. courts.<sup>92</sup>

The non-inquiry standard has the advantages of speed and efficiency because courts need not conduct lengthy hearings into the nature of foreign law and conditions and thus save time and resources. Moreover, this standard obviates the need for courts to make controversial judgments about the quality of foreign criminal justice systems. The courts should consider such matters to be foreign affairs issues to be addressed by the executive. It suggests that, as a matter of institutional capacity, courts have limited ability to evaluate consistently conditions in foreign states. Advocates of the non-inquiry standard contend that the refusal of a state to extradite a fugitive on the basis of humanitarian concerns would place the state in violation of its treaty obligations and would contravene domestic law.<sup>93</sup> The non-inquiry standard also ensures that fugitives do not escape trial and punishment: If a domestic court declines to allow a fugitive to be surrendered for extradition because the fugitive would face objectionable treatment abroad, the fugitive would in most cases not be tried at all.

Yet the rule of non-inquiry is undesirable as a standard of review of ministerial surrender decisions in extradition cases. Although the non-inquiry rule reflects an understandable concern to protect the public against international fugitives, it does not adhere to constitutional values or protect individual rights.<sup>94</sup> Measured against the three elements stressed by the European

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90. See *In re Rosenberg* [1918] 29 C.C.C. 309, 313 (Man. C.A.) (Can.) (determining that fact that fugitive will not receive fair trial abroad is irrelevant to decision to extradite). See generally Stephen R. Morrison, *Extradition from Canada: Rights of the Fugitive Following Committal for Surrender*, 19 CRIM. L.Q. 366 (1977) (surveying remedies available to fugitive and proposing reforms).

91. See *R. v. Governor of Pentonville Prison* [1991] 2 App. Cas. 64 (H.L.) (appeal taken from Eng.). More recent developments indicate that the executive decision to surrender a fugitive for extradition may be subjected to judicial review on the basis of rationality, according to the *Wednesbury* principle, see *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 (Eng. C.A.). See *R. v. Secretary of State for the Home Dep't* [1992] Imm. A.R. 293 (Eng. Q.B. Div'l Ct.) (holding it unjust and oppressive to return fugitive to United States). But see *R. v. Secretary of State for the Home Dep't ex p. Launder* [1997] 1 W.L.R. 839 (H.L.) (refusing to quash surrender order sending fugitive to Hong Kong). Some Canadian commentators have expressed surprise that the English administrative law doctrines of unreasonableness and disproportionality play an increasingly large role in England but have seemingly little impact on the process of Charter review in Canada. See, e.g., JOHN M. EVANS ET AL., *ADMINISTRATIVE LAW: CASES, TEXT, AND MATERIALS* 1051 (4th ed. 1995) (comparing England's use of reasonableness and disproportionality to expand scope of review of discretion with Canada's use of same standards for restricting scope of review).

92. See, e.g., *In re Extradition of Smith*, 82 F.3d 964, 965 (10th Cir. 1996) (holding that court will not inquire into fairness of requesting state's justice system); *Yapp v. Reno*, 26 F.3d 1562, 1565 (11th Cir. 1994) (holding that American defendant in extradition case has no right to speedy foreign trial under Sixth Amendment); *In re Extradition of Howard*, 996 F.2d 1320, 1329-30 (1st Cir. 1993) (noting that non-inquiry rule precludes examination of fairness of requesting state's judicial system); see also Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition*, 76 CORNELL L. REV. 1198, 1205 (1991) ("All circuits that have considered the issue have adopted the rule of non-inquiry . . . ." (footnote omitted)).

93. See Semmelman, *supra* note 92, at 1221.

94. See, e.g., *In re Normano*, 7 F. Supp. 329, 330-31 (D. Mass. 1934) (rejecting Jewish fugitive's efforts to resist extradition to Nazi Germany in order to avoid religious persecution). But there are

Court in *Soering*—(1) domestic constitutional standards; (2) international human rights law; and (3) the law of state responsibility—the non-inquiry standard is inadequate. The standard gives no regard to either domestic constitutional norms or international human rights law. Moreover, it ignores the potential for state responsibility arising from surrender of a fugitive to face unconscionable treatment in the requesting state. As such, the non-inquiry standard is insensitive to modern realities and should be rejected as an alternative to the residual threshold standard.

### 5. *The Domestic Threshold Standard*

The second possible alternative to the residual threshold standard is a “domestic threshold” standard under which courts of the extraditing state would subject the laws and procedures of the requesting state to scrutiny on a domestic constitutional standard.<sup>95</sup> In cases in which foreign laws or practices violate domestic constitutional standards, extradition would be refused. The domestic threshold standard makes no allowance for the transnational context of extradition. Indeed, the treatment or punishment that the fugitive could face in the requesting state is essentially deemed to be the action of the domestic authorities for purposes of Charter review.

Something similar to the domestic threshold standard is often thought to be the approach that the European Court set forth in the celebrated *Soering* case.<sup>96</sup> A version of the domestic threshold standard, influenced by the reasoning of *Soering*, has been adopted by courts in Ireland<sup>97</sup> and the Netherlands.<sup>98</sup> The domestic threshold standard has its supporters in Canada as

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decisions that go the other way. See, e.g., *United States ex rel. Weinberg v. Schlottfeldt*, 26 F. Supp. 283, 284 (N.D. Ill. 1938) (declining to deport Jewish alien to Czechoslovakia because doing so at the time would constitute “cruel and inhuman punishment”).

95. See David B. Sullivan, *Abandoning the Rule of Non-Inquiry in International Extradition*, 15 HASTINGS INT'L & COMP. L. REV. 111, 124–33 (1991); cf. John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L L. & COM. REG. 401, 434–38 (1990) (subjecting United States's imposition of death penalty to human rights norms).

96. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). On *Soering*, see generally Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845 (1990); Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991); John Quigley & S. Adele Shank, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?*, 30 VA. J. INT'L L. 241 (1989); and Christine Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757 (1990).

97. See, e.g., *Ellis v. O'Dea* [1991] 1 I.R. 251 (Ir.) (holding that allegations that foreign trials do not meet Irish constitutional standards were unsubstantiated); *Finucane v. McMahon* [1990] 1 I.R. 165 (Ir.) (holding that extradition will be refused when it can be demonstrated that fugitive would face ill treatment in requesting state); *Russell v. Fanning* [1988] I.R. 505, 531 (Ir.) (discussing assault and ill treatment of prisoners recaptured after escape from Maze prison).

98. See Judgment of Mar. 30, 1990, *Hoge Raad der Nederlanden (HR)* (Sup. Ct.), 16 RvdW 76, 343 (Neth.), reprinted in *The Netherlands: Opinion of the Advocaat-Generaal and Supreme Court Decision in The Netherlands v. Short*, 29 I.L.M. 1375 (1990) (Neth.) (declining to extradite U.S. soldier to United States to face death penalty).

well, most notably Professor David Beatty.<sup>99</sup> It is understandable that those who object to the non-inquiry standard would prefer a greater role for domestic constitutional norms in extradition law. Nevertheless, the arguments against the domestic threshold standard are too strong. The most fundamental objection to a domestic threshold standard was advanced by Justice McLachlin in *Kindler*: "If we were to insist on strict conformity with our own system, there would be virtually no state in the world with which we could reciprocate."<sup>100</sup> Moreover, while the domestic threshold standard possesses the advantages of vindicating the rights of fugitives, it suffers from serious disadvantages that render it inappropriate for adoption by Canadian courts. First, it undermines the effectiveness of the extradition system. The domestic threshold standard would cause undue delays in the extradition of fugitives. Indeed, in many cases it would prevent extradition altogether. Although this may be appropriate in some cases, as I shall argue below, the domestic threshold standard tips the delicate balance between individual rights and the public interest too far in favor of the former.

In essence, extradition is an international process of cooperation between states for the suppression of crime and the protection of the public.<sup>101</sup> It facilitates the orderly return of fugitives to the states in which they are alleged to have committed offenses or to the states that suffered harm from those offenses. Without extradition, it would be easy for fugitives to evade prosecution merely by crossing borders.<sup>102</sup> The extradition process provides "a mechanism to overcome the jurisdictional and territorial difficulties of prosecuting and punishing serious crimes committed by fugitives who have left the country in which the crimes were committed."<sup>103</sup> Extradition serves a pressing social goal, and the domestic threshold standard of review simply does not accord the public interest sufficient weight.

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99. See DAVID M. BEATTY, *CONSTITUTIONAL LAW IN THEORY AND PRACTICE* 85 (1995); Beatty, *supra* note 86, at 488-89, 494-95 (1997).

100. *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 844-45 (Can.).

101. See *United States v. Waddell* [1993] 87 C.C.C.3d 555, 557-58 (B.C. C.A.) (Can.).

102. On the importance of suppressing transnational crime, see *Libman v. R.* [1985] 2 S.C.R. 178, 213-14 (Can.), which states the importance of international cooperation for national law enforcement; *Director of Pub. Prosecutions v. Doot* [1973] App. Cas. 807, 834 (H.L.) (Eng.), which provides rationales for the trend in expanding criminal jurisdiction over extraterritorial crimes; and Edward M. Morgan, *Criminal Process, International Law, and Extraterritorial Crime*, 38 U. TORONTO L.J. 245, 273 (1988), which discusses the movement toward internationalization in the application of criminal law.

103. *United States v. Kerslake* [1996] 142 Sask. R. 112, 120 (Sask. Q.B.) (Can.); see also *United States v. Manno* [1997] 112 C.C.C.3d 544, 551 (Que. C.A.) (Can.) ("[T]he extradition process forms part of an approach which has a much more practical purpose, namely to minimize the effect of borders which separate states in order to bring the criminal to justice and to have him answer for his acts."), *leave to appeal refused*, [1997] 115 C.C.C.3d vi (Can.).

### C. *Why the Residual Threshold Standard Is Desirable*

#### 1. *The Residual Threshold Standard*

Between the extremes of the non-inquiry standard and the domestic threshold standard lies the residual threshold standard for review of ministerial surrender decisions. As discussed above in Subsection II.B.2, the Supreme Court of Canada has adopted the outline of a residual threshold standard. Courts in other states also have developed various forms of it.<sup>104</sup> Under the residual threshold standard, courts generally defer to ministerial surrender decisions, but they will intervene in "compelling situations."<sup>105</sup> The Supreme Court has indicated that extradition will violate the principles of fundamental justice under section 7 where the fugitive faces a "simply unacceptable" situation<sup>106</sup> or where the foreign punishment "sufficiently shocks" the Canadian conscience.<sup>107</sup> The courts claim a residual discretion to intervene but will invoke it rarely.

Only the residual threshold standard of review balances the three *Soring* factors against the practical realities of the international extradition system. The residual threshold standard gives weight to domestic constitutional norms but does not invoke them on a purely domestic standard. The residual threshold standard acknowledges the international context in which extradition must operate and uses this context as a factor in the interpretation of domestic Charter standards. The residual threshold standard also makes use of international human rights norms to interpret domestic Charter norms. In this way, the threshold point at which courts will intervene to prevent surrender of a fugitive for extradition is guided by whether international human rights norms would be violated by the surrender so that state responsibility would follow.

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104. The possibility of refusing to extradite has been kept open on occasion by U.S. courts but has always been denied on the facts. *See, e.g.,* Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d Cir. 1980); Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960); *see also* Parretti v. United States, 112 F.3d 1363, 1369 n.8 (9th Cir. 1997) (acknowledging possibility of judicial inquiry into anticipated treatment of fugitive in requesting state); Prushinowski v. Samples, 734 F.2d 1016, 1019 (4th Cir. 1984) (stating in dicta that extradition is unlikely where foreign conditions are extreme). *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 cmt. h (1987) [hereinafter RESTATEMENT] (discussing extradition when there is danger of persecution or unfair trial). Recent decisions, however, indicate that the rule of non-inquiry remains firmly entrenched. *See, e.g.,* Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990) (repudiating *Gallina v. Fraser*); *In re* Extradition of Sandu, 886 F. Supp. 318, 321-23 (S.D.N.Y. 1993).

105. *R. v. Schmidt* [1987] 1 S.C.R. 500, 526 (Can.). A similar approach is suggested in Leslie Anderson, *Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception*, in 1983 MICH. Y.B. INT'L LEGAL STUD. 153, 164 (John M. Lummis et al. eds., 1983).

106. *United States v. Allard* [1987] 1 S.C.R. 564, 572 (Can.); *see also* *R. v. Larabie* [1988] 42 C.C.C.3d 385, 390 (Ont. H.C.J.) (Can.) ("[T]here may come a point where the consequences of extradition would be so extreme as to outrage the standards of decency.").

107. *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 849 (Can.); *Schmidt* [1987] 1 S.C.R. at 522.

## 2. *The International Public Interest*

Extradition serves the public interest by ensuring that Canada does not become a safe haven for foreign fugitives. Extradition also fulfills Canada's treaty obligations, and in an interdependent world, it serves the goals of international cooperation and comity by facilitating the protection of the public, both in the requesting state and elsewhere. To be sure, extradition has an important human rights dimension. But the interest of states in prosecuting and suppressing crime should not be ignored. Often, fugitives take advantage of the ease of crossing borders in order to engage in criminal activity or to evade capture but are quick to invoke the protection of those same borders once they are apprehended.<sup>108</sup>

In response, a nascent idea of the protection of the international public interest is developing.<sup>109</sup> This concept recognizes that Canada has an interest in ensuring that its territory not be used as a staging ground for criminal activity in foreign states. The Supreme Court of Canada supported the idea in *Libman v. R.*, a case concerning the prosecution in Canada for fraud of a defendant who allegedly operated a "boiler room" telephone stock sales operation in Toronto that solicited purchases by U.S. residents of shares in Costa Rican corporations. The Supreme Court held that Canada properly exercised prescriptive jurisdiction over the offense because there was a real and substantial connection between the offense and Canada. Justice La Forest wrote, "[W]e should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers. In the criminal arena this is underlined by the international cooperative schemes that have been developed among national law enforcement bodies."<sup>110</sup>

Justice La Forest was suggesting that Canada has a strong interest in protecting the public in other states and ensuring that Canadian territory does not provide a safe haven for criminals who "prey on [foreign] citizens."<sup>111</sup> This idea of an "international public interest" should play an important role in section 7 and section 1 Charter review of ministerial surrender decisions. Just as rigid adherence to a territorial conception of prescriptive jurisdiction would render transnational crime unpunishable, a rigid invocation of domestic constitutional norms would do so in the extradition context. This does not mean that fugitives do not possess Charter rights, but it does mean that the scope of those rights should be determined by reference to the context in

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108. See Michell, *supra* note 53, at 444.

109. See *United States v. Cotroni* [1989] 1 S.C.R. 1469, 1486-87 (Can.); Morgan, *supra* note 102, at 273-75. Justice La Forest asserts that Canada is part of an emerging world community and should not confine itself to parochial and nationalistic concepts of community. See *Cotroni* [1989] 1 S.C.R. at 1486.

110. *Libman v. R.* [1985] 2 S.C.R. 178, 214 (Can.). Similar language is employed in *Cotroni* [1989] 1 S.C.R. at 1485-86, and *Director of Public Prosecutions v. Doot* [1973] 1 App. Cas. 807, 831, 834 (H.L.) (Eng.).

111. *Libman* [1985] 2 S.C.R. at 214.



which they are to be exercised.<sup>112</sup> The existence of international extradition treaties emphasizes the importance of the governmental objectives for the purposes of section 7 and section 1 interpretation.<sup>113</sup> The goal must be to balance the protection of individual rights and the effectiveness of the extradition system.

### 3. *The Charter and Extradition Treaties*

The Canadian Government cannot derogate from Charter rights simply by entering into international treaties and enacting those treaties into domestic law.<sup>114</sup> Yet at the same time, an ex post facto imposition of strict Charter requirements upon the extradition process easily could lead Canada to breach its treaty obligations, which also would be undesirable. In general, the Charter should be interpreted so as not to violate existing treaty obligations, and in cases of ambiguity, it should be interpreted by reference to them. The international extradition system is part of the backdrop against which the Charter was adopted, and as Justice La Forest noted in *Cotroni*, the Charter must not be interpreted in an historical vacuum.<sup>115</sup>

An enlightened approach to interpretation may provide considerable latitude to courts in avoiding conflicts between treaties and the Charter. Treaties and implementing legislation should be interpreted (so far as possible) in such a manner as to comply with the Charter. Moreover, the applicable treaty will have been implemented into domestic law by the Extradition Act, which clearly states that specific provisions in the treaty trump inconsistent provisions of the Extradition Act.<sup>116</sup> As extradition treaties are to be interpreted according to the rules of public international law,<sup>117</sup> which includes international human rights law, the latter might be a useful interpretative aid for Canada's treaty obligations and the dictates of the Charter. According to one theory, a refusal to surrender a fugitive for extradition because of concerns about the fairness of proceedings in the requesting state

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112. See *Kindler* [1991] 2 S.C.R. at 833 (Can.) (stating that "the global context must be kept squarely in mind" in performing balancing exercise under section 7); *id.* at 848 (McLachlin, J., concurring). But see O'Boyle, *supra* note 81, at 99-100 (criticizing international public interest approach as justifying derogation from rights of fugitives).

113. See *Slaight Communications, Inc. v. Davidson* [1989] 1 S.C.R. 1038, 1056 (Can.) (ratification of treaty indicates importance of governmental objective under section 1).

114. See *United States v. Alfaro* [1992] 75 C.C.C.3d 211, 229 (Que. C.A.) (Can.) (stating that extradition is subject to juridical sovereignty of Charter).

115. See *Cotroni* [1989] 1 S.C.R. at 1490-91 (La Forest, J., concurring); see also *Thomson Newspapers v. Director of Investigation & Research* [1990] 1 S.C.R. 425, 578 (Can.) (noting that long-standing practices may be influential in indicating scope of "fundamental justice" under section 7); *id.* at 539, 547 (La Forest, J., concurring). Treaties are usually invoked in Charter litigation in order to expand the scope of the Charter right in question. But there is no reason why international obligations should not also be invoked to establish a context within which Charter rights should be defined, thereby structuring the broad language of Charter rights without necessarily expanding their scope.

116. See Extradition Act, R.S.C., ch. E-23, § 3 (1985) (Can.) (noting that applicable treaty provision prevails in event of inconsistency with Extradition Act).

117. See *In re Palacios* [1984] 45 O.R.2d 269, 277 (Ont. C.A.) (Can.).

might be considered merely a form of treaty interpretation, because fair treatment of the fugitive could be thought of as an implied term of an extradition treaty.<sup>118</sup>

Yet at a certain point, either the treaty or the Charter must yield where there is a fundamental incompatibility between the two. In the end, the Charter will trump a treaty for the purposes of domestic law.<sup>119</sup> In the event of a conflict between the Charter and an extradition treaty, the preferable approach would be for the court to "read down" the relevant portion of the domestic implementation legislation so as to give it no effect. The executive then would be compelled to amend Canada's extradition treaties explicitly so that they comply with Charter norms and to require new treaties to accord with them as well.<sup>120</sup> This would be an exceptional remedy, however, and the vast majority of cases would not reach this stage.

#### 4. *The Unworkability of the Domestic Threshold Standard*

Although the domestic threshold standard has its attractions, it is unworkable in practice. Three main arguments caution against its adoption. First, the domestic threshold standard would cause undue delay, seriously impairing the efficient operation of the extradition process. Second, the domestic threshold standard does not give sufficient weight to the values of mutuality and reciprocity, nor to the practical compromises that those values necessitate. Third, the domestic threshold standard does not afford an appropriate measure of deference to the superior expertise of the executive in foreign relations.

The first argument against the domestic threshold standard is that it represents a counsel of perfection that is unworkable because it would lead to undue delay in the return of fugitives to face trial. Among the most important elements of an effective international extradition system is the need to

118. See Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85, 129 (1992); Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1325 (1962).

119. The position in *Martin v. Warden*, 993 F.2d 824, 829 (11th Cir. 1993) ("The constitutional rights of individuals, including the right to due process, are superior to the government's treaty obligations.") was expressly taken by Justice La Forest in *R. v. Schmidt* [1987] 1 S.C.R. 500, 520-21 (Can.), and implied by Justice Wilson, *see id.* at 533. Accordingly, the possibility must exist that at the margin, an extradition treaty and/or its accompanying implementation legislation could be unconstitutional on Charter grounds. No one doubts that Canada can legislate in violation of its international obligations, but courts will presume against such an eventuality and require a clear indication of legislative intent to do so. *See Daniels v. White* [1968] S.C.R. 517, 541 (Can.). In general, domestic legislation that implements treaty obligations will be interpreted in such a way as to be consonant with those obligations. *See National Corn Growers Ass'n v. Canada (Import Tribunal)* [1990] 2 S.C.R. 1324, 1371 (Can.). The traditional view is that the Crown treaty-making prerogative is not amenable to judicial review. *See R. v. Secretary of State for Foreign and Commonwealth Affairs* [1994] Q.B. 552, 569-70 (1993) (Eng.). Whether this is true in a post-Charter era is uncertain; it seems more likely that the Crown's prerogative would be considered amenable to review, but on a deferential standard. *See Operation Dismantle v. R.* [1985] 1 S.C.R. 441 (Can.).

120. *See, e.g., Treaty of Extradition*, Mar. 16, 1990, Can.-Mex., art. IV(b), [1990] Can. T.S. No. 35 (incorporating "fundamental justice" standard articulated by Supreme Court under section 7).

minimize the time from the fugitive's arrest abroad to his return to face trial or imprisonment in the requesting state. The residual threshold model would satisfy this concern; the domestic threshold standard would not. Clearly, reducing delay should be a concern in *all* civil and criminal processes. But in the particular context of extradition, the steps that a Canadian court takes must be premised on the knowledge that the fugitive will receive a full trial in the requesting state upon his return. The greater the number of procedural requirements imposed upon the extradition process in Canada, the greater the likelihood that the Canadian proceedings will evolve into a *de facto* full trial on the merits. The practical effect of a domestic threshold standard would be to subject the fugitive to two trials, one in Canada and one abroad. Problems of delay and double jeopardy then would arise.

Moreover, the longer the delay in the return of a fugitive to the requested state, the less likely it is that a conviction will be secured in *any* state for reasons entirely unconnected to the merits of the case against the fugitive. The extradition system thus has been constructed with the need for dispatch in mind.<sup>121</sup> An extradition hearing is not a trial and should not expand to become one, lest the goals of the extradition system be compromised.<sup>122</sup> A more intrusive standard of review would multiply the number of cases for review and increase the burden on the courts.<sup>123</sup> Increased delay also might provide an incentive for foreign states to resort to irregular techniques to secure the return of requested fugitives.<sup>124</sup>

The second argument against the domestic threshold standard is rooted in the values of mutuality and reciprocity, both of which militate strongly in favor of a residual threshold standard of review. Adoption of a domestic threshold standard would make it very unlikely that Canada would be able to abide by its treaty obligations to extradite fugitives because, if taken literally, almost no fugitives could ever be extradited. If Canada could not fulfill its treaty obligations, it could not expect its treaty partners to reciprocate by extraditing requested fugitives.<sup>125</sup> Given diversity among states, the interna-

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121. See *United Kingdom v. James* [1996] O.J. No. 369, ¶ 9 (Ont. Gen. Div.) (Can.) ("Proceedings in Canadian courts in furtherance of Canada's international obligations are by their very nature intended to be expeditious."), *appeal allowed in part*, [1996] 108 C.C.C.3d 289 (Ont. C.A.) (Can.), *leave to appeal refused*, [1997] 114 C.C.C.3d vi (Can.). Cases addressing the constitutionality of extraditing a fugitive where delay has been caused by the foreign government that might be prejudicial to the fugitive may be distinguished on the basis that in those cases the delay was not caused by the domestic authorities. See *United States v. Allard* [1987] 1 S.C.R. 564, 571-72 (Can.); *Argentina v. Mellino* [1987] 1 S.C.R. 536, 552 (Can.); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). Undue delay may be taken into consideration in the courts of the requesting state. As well, the Canadian position on the impact of delay in purely domestic cases is unclear, so it would be difficult to invoke it as a standard against which foreign law should be evaluated. Finally, it should not be forgotten that in some cases the delay was caused by the fugitive himself. See *R. v. McMaster* [1996] O.J. No. 402 (Ont. Gen. Div.) (Can.); *Kakis v. Government of the Republic of Cyprus* [1978] 1 W.L.R. 779, 782-83 (H.L.) (Eng.).

122. See *In re McVey* [1992] 3 S.C.R. 475, 551 (Can.) ("[E]xtradition proceedings are not trials. They are intended to be expeditious procedures to determine whether a trial should be held.")

123. See O'Boyle, *supra* note 81, at 106.

124. See Michell, *supra* note 53, at 460 n.383.

125. See *Idziak v. Canada (Minister of Justice)* [1992] 3 S.C.R. 631, 663 (Can.).

tional extradition system could not function if states subjected extradition to full domestic constitutional standards. The international obligations inherent in extradition proceedings must not be ignored. The principles of mutuality and reciprocity counsel that a residual threshold standard of review is more appropriate than a domestic threshold standard.

Transnationalism in the abstract is not a goal in itself; rather, transnationalism is valuable and worthy of consideration under section 1 of the Charter only so far as it advances important social goals.<sup>126</sup> A residual threshold standard recognizes that comity and reciprocity should be accorded weight because they serve a functional purpose—they ensure that the extradition system operates efficiently and also that when parties sign an extradition treaty, they make a bargain to serve their own interests. Canada hardly can expect other states to accede to its requests for extradition if it imposes its full domestic standards upon the criminal justice systems of its treaty partners when they request extradition of fugitives from Canada. There is a tradeoff between the rights of fugitives to have the Charter apply to them on a purely domestic standard and the pressing social goal of maintaining a functioning extradition system. This is precisely the sort of tradeoff that section 1 was designed to address.<sup>127</sup>

By subjecting foreign criminal justice systems to domestic constitutional standards, the domestic threshold standard of review would impugn the good faith of the requesting state, making it less likely that effective extradition relationships could be developed or maintained.<sup>128</sup> Although domestic courts should, so far as possible, avoid making pronouncements regarding the validity of a foreign state's social policies, the good faith of the requesting state pales in comparison to the fundamental rights of fugitives.<sup>129</sup> That said, the cases rarely concern fundamental rights such as protection against torture. Far more common are cases over which reasonable people may disagree as to whether a fundamental right is truly at issue.

The third argument against the adoption of the domestic threshold standard is that it does not reflect the modern notion that in exercising judicial review, courts should accord a measure of deference to bodies with superior expertise. Extradition necessarily implicates treaty obligations with a foreign state, traditionally viewed as a matter of executive competence and expertise.<sup>130</sup> It now seems plain that the executive's greater degree of institutional competence does not immunize extradition from judicial review because there is no subject entitled "foreign relations" within which executive action

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126. See Hathaway & Neve, *supra* note 14, at 269.

127. See *id.* at 267.

128. It is debatable whether as a matter of policy it is preferable to have the courts or the executive do this.

129. See *Chan v. Canada (M.E.I.)* [1995] 3 S.C.R. 593, 631-32 (Can.) (La Forest, J., dissenting).

130. See *In re McVey* [1992] 3 S.C.R. 475, 518-20 (Can.).

is unreviewable.<sup>131</sup> A long Anglo-Canadian jurisprudential history to the contrary is now discredited.<sup>132</sup> The executive's degree of expertise does suggest, however, that a degree of judicial deference to both the executive's factual and legal analyses of the foreign relations dimensions of the case is appropriate.<sup>133</sup>

Some have argued against a domestic threshold standard on the grounds of institutional capacity, claiming that the courts are less competent than the executive to make determinations about the quality of foreign criminal justice systems without jeopardizing any policy interests of the United States.<sup>134</sup> The alleged inability of the courts to make determinations about foreign law and conditions is illusory, however. The courts regularly review such determinations in the immigration, refugee, and asylum context.<sup>135</sup> There are, admittedly, important differences between immigration and extradition<sup>136</sup> that suggest that a more deferential standard of review is appropriate for the latter.<sup>137</sup> Nonetheless, as a matter of theory, it is not at all clear that courts are incapable of making determinations as to the treatment to which the fugitive is likely to be subjected in the requesting state. Thus, although there are a number of strong arguments against the adoption of the domestic threshold standard, the alleged incapacity of the courts to evaluate foreign legal systems is not one of them.

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131. See *Operation Dismantle v. R.* [1985] 1 S.C.R. 441, 459 (Can.).

132. See, e.g., *The Arantzazu Mendi* [1939] App. Cas. 256, 264 (H.L.) (Eng.) ("Our State cannot speak with two voices . . . the judiciary saying one thing, the executive another.").

133. Deference is appropriate for the same reasons that deference is accorded to administrative tribunals on appeals or judicial review, namely, and primarily, because of their relative expertise. See *Canada v. Southam, Inc.* [1997] 144 D.L.R.4th 1, 11 (Can.); *Canadian Union of Public Employees, Local 301 v. Montreal* [1997] 1 S.C.R. 793, 810-11 (Can.); *Bell Canada v. Canadian Radio-television & Telecomms. Comm'n* [1989] 60 D.L.R.4th 682, 699 (Can.). Thus, deference is accorded both to the executive's factual and legal judgment as to the legality of its own actions. *But cf.* *Finzer v. Barry*, 798 F.2d 1450, 1460 (D.C. Cir. 1986) (ruling that U.S. federal judiciary owes no deference to executive's legal interpretation of statute), *aff'd in part, rev'd in part*, 485 U.S. 312 (1988).

134. See Semmelman, *supra* note 92, at 1229-30.

135. See *Immigration Act*, R.S.C., 1985, ch. I-2, § 114(1)(s) (Can.); LORNE WALDMAN, *IMMIGRATION LAW AND PRACTICE* § 8.25 (1992); see also *Chan v. Canada (M.E.I.)* [1995] 3 S.C.R. 593, 594-95 (reviewing determination of whether appellant was Convention refugee); *Canada (A.G.) v. Ward* [1993] 2 S.C.R. 689, 693 (Can.) (holding that appellant did not meet criteria of Convention refugee).

136. First, extradition, unlike immigration, is a creature of treaty and involves requests made by foreign states under such treaties. (Refugee status determination is, of course, an exception to this in that it is largely a response to treaty obligations.) Second, time is of the essence in extradition matters in a way that it usually is not in immigration cases. Third, deportation is permanent, whereas extradition is not: A fugitive may always return after a foreign trial, either after an acquittal or after serving his sentence there. *But see* *United States v. Burns* [1997] 116 C.C.C.3d 524, 534 (B.C. C.A.) (Can.) (noting that extradition will be permanent if extradited fugitive is put to death). Fourth, only non-citizens may be deported, whereas extradition applies to both citizens and non-citizens.

137. The appropriate standard of judicial review in immigration and refugee cases is the subject of open debate. See, e.g., Hathaway & Neve, *supra* note 14, at 269 (arguing against "deflection scheme" standards while favoring standards based on Canadian "core values"). The point here is only that a more deferential standard of review is appropriate in extradition cases. See, e.g., *Chan* [1995] 3 S.C.R. at 627-29 (La Forest, J., dissenting) (identifying Refugee Convention obligations).

Further evidence refuting the argument that courts should not engage in review of ministerial surrender decisions is that in some countries (although not in Canada) the political offense exception to extradition, whereby extradition will be refused for so-called "political offenses,"<sup>138</sup> is administered by the courts.<sup>139</sup> This indicates that courts are able to investigate ministerial surrender decisions using a more intrusive standard of review than the non-inquiry standard.<sup>140</sup> Some have argued that the executive possesses considerably more expertise in extradition matters than does the judiciary and that the standard of judicial review of ministerial surrender decisions should accordingly reflect this disparity in expertise.<sup>141</sup> Yet the expertise argument is unconvincing as an argument barring the courts from reviewing ministerial surrender decisions. Although the executive is probably better informed about developments in foreign states, this same degree of relative expertise may not exist in individual cases.<sup>142</sup> Nevertheless, over the range of cases, it is the executive whose expertise is relatively greater. It follows that the standard of review should be deferential but not abdicationist.

The true issue is not whether the courts *could* exercise judicial review on a domestic threshold standard but rather the prudence and appropriateness of doing so. It is neither feasible nor desirable for courts to conduct intrusive examinations of foreign criminal justice systems in all cases. The courts speak of "judicial self-restraint" in the extradition context.<sup>143</sup>

It is also unpersuasive to argue that the adoption of any standard other than the non-inquiry standard is likely to embroil Canada in international controversy by making determinations as to the conditions facing a fugitive abroad. In Canada, the courts interpret the State Immunity Act<sup>144</sup>—deciding

138. On the operation of the political offense exception in Canada, see *In re McVey* [1992] 3 S.C.R. 475, 516 (Can.); LA FOREST, *supra* note 3, at 81-98; and J.G. Castel & Marlys Edwardh, *Political Offences: Extradition and Deportation—Recent Canadian Developments*, 13 OSGOODE HALL L.J. 89 (1975).

139. For example, the United States is one such country. The operation of the doctrine is controversial. See, e.g., Michael P. Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257, 258-59 (1988) (arguing against application of inquiry provisions of treaty on prudential grounds).

140. Canadian courts play a limited role in the operation of the political offense exception. See Extradition Act, R.S.C., ch. E-23, § 21 (1985) (Can.); *In re Wisconsin & Armstrong* [1973] 10 C.C.C.2d 271, 297 (Fed. C.A.) (Can.). To date, the Canadian position has been that the allegation that a prosecution is motivated by political reasons in the requesting state is a consideration for the executive, not the courts. See Extradition Act § 22(1) (Can.); *United States v. Liebowitz* [1987] 3 W.C.B.2d 169 (Ont. Dist. Ct.) (Can.). Under the approach proposed in this Article, this position would change.

141. See, e.g., Semmelman, *supra* note 92, at 1240-41.

142. See John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1237 (1996) ("Inquiry issues associated with extradition can be handled better by a court than by the executive branch because the required inquiry involves factual issues with legal elements.").

143. See *Gervasoni v. Canada* (Minister of Justice) [1996] 72 B.C.A.C. 141, 147 (B.C. C.A.) (Can.), *leave to appeal refused*, [1996] 2 S.C.R. vii (Can.).

144. State Immunity Act, R.S.C., ch. S-18 (1985) (Can.). It should be noted, however, that the record of courts under this legislation has been highly deferential to the executive, in the sense that the courts have adopted an expansive interpretation of the scope of immunity accorded by the Act, so that for-

whether foreign states and their agencies should be subject to domestic law—without embroiling the country in international political controversies. An independent judiciary, skilled at protecting individual rights, is less likely to be swayed by considerations of political expediency than the executive.<sup>145</sup> There is always a concern that the executive may extradite a fugitive despite human rights concerns in order to mollify or curry favor with the requesting state. Given the pervasive pressure upon the executive to maintain good international relations, it can plausibly be argued that it would be *less* controversial to have the courts make politically sensitive extradition decisions in part because the executive would be insulated from political responsibility.<sup>146</sup> The residual threshold standard strikes an appropriate balance between deference to the foreign relations expertise of the executive and the need to retain a residual power in the courts to quash surrender decisions in compelling cases.

### 5. *A Margin of Appreciation*

In the extradition context, Canadian courts must make allowance for something akin to a margin of appreciation regarding Canada's treaty partners and the domestic executive. The goal is to project the Charter outward while simultaneously restraining it within a web of international human rights law. The result should be a generally deferential standard of review that reserves to the courts a residual ability to intervene to quash surrender orders where the margin of appreciation was exceeded.

The idea may at first appear controversial. Professor Beatty, for example, disagrees vehemently with what he regards as an overly deferential standard of constitutional review that the Supreme Court of Canada has adopted in extradition cases.<sup>147</sup> Beatty's criticism of the Supreme Court's adoption of a residual threshold standard of review in extradition cases is misplaced; nevertheless, his thesis does impel its critics to provide a more sophisticated theoretical response to the argument that constitutional judicial review in extradition cases should be exercised on a domestic threshold standard. An important potential source of such a response—the European Convention's concept of the "margin of appreciation"—is addressed at some

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eign states are largely insulated from litigation in Canadian courts. See *Walker v. Bank of New York* [1994] 16 O.R.3d 504, 507-08 (Ont. C.A.) (Can.).

145. See Hughes, *supra* note 72, at 317; John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1485 (1988); Morrison, *supra* note 90, at 368; Quigley, *supra* note 142, at 1237, 1240.

146. See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 104-06 (1992).

147. Beatty's criticism of the extradition cases is but part of a larger critique of the Court's contextual approach to constitutional judicial review. Beatty argues that the contextual approach to judicial review leads to a subversion of the doctrine of constitutional supremacy and an erosion of the principles of rationality and proportionality which, he contends, infuse constitutional review of legislative and executive acts. See BEATTY, *supra* note 99, at 92.

length in Professor Beatty's own book.<sup>148</sup> The margin of appreciation doctrine provides a valuable theoretical base upon which to build a Canadian standard of review of ministerial surrender decisions in extradition cases.

The margin of appreciation originated in the jurisprudence of the European Court of Human Rights.<sup>149</sup> It embodies the observation that the distinct national systems of law of the various European Convention states allow Convention rights to be vindicated through different means. The Convention does not necessarily mandate uniformity among Convention states, but it does protect fundamental values. The margin of appreciation stems from a combination of principled judicial self-restraint and pragmatic recognition that national authorities are, as a general rule, better placed to address the national protection of Convention rights than a distant international body. The margin of appreciation is largely grounded in a judicial awareness of the international context, given that the European Court interprets a treaty—the European Convention—that applies human rights standards to a variety of states.

In practice, the margin of appreciation provides Convention states with some leeway in designing statutory and administrative regimes to implement Convention rights.<sup>150</sup> The doctrine arises most often in cases in which there is no consensus in the law and practice of the Convention states, meaning that the Court will tolerate a certain degree of diversity in legal and administrative practice among the Convention states. Where, however, the practice of Convention states is more uniform—indicating that commonly shared fundamental values are at stake—the margin of appreciation is very narrow and a strict standard of review will apply.<sup>151</sup>

The margin of appreciation has been influential in Canadian constitutional law, particularly in relation to the minimal impairment element of the *Oakes* test, which enumerates the steps that the government must take in order for an otherwise unconstitutional statute or practice to be upheld under section 1 of the Charter.<sup>152</sup> By interpreting the minimal impairment branch of the *Oakes* test to mean that an impugned law or practice must infringe the Charter right as little as reasonably possible in order to be upheld under section 1, the Supreme Court of Canada has allowed legislatures some leeway in designing statutory and administrative regimes. Furthermore, the Supreme Court will not always insist upon its own view of the least possible restrictive means. The law or practice under review will satisfy this element of the *Oakes* test as long as it is within a reasonable zone of "least restrictiveness."

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148. See *id.* at 138–40, 146–48.

149. See J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* ch. 7 (2d ed. 1993); R. St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*, *supra* note 79, at 83.

150. See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 35–31 to 35–35 (1997).

151. See Graham Zellick, *The European Convention on Human Rights: Its Significance for Charter Litigation*, in *CHARTER LITIGATION* 97, 103 (Robert J. Sharpe ed., 1987).

152. See *R. v. Oakes* [1986] 1 S.C.R. 103, 135–40 (Can.).



It may be helpful to transpose the margin of appreciation concept to the international extradition context. Of course, the analogy is not exact. A Canadian court that exercises constitutional judicial review of ministerial surrender decisions does not exercise a review power granted to it by treaty, nor does it apply the terms of an international treaty to other signatory states. Many of the issues that must be addressed, however, are similar.

In making this proposal, I should explain why the margin of appreciation concept was not invoked in *Soering* itself. The primary reason seems to be that the margin of appreciation doctrine historically has been invoked in cases involving disagreement among Convention states over fundamental values, not between Convention states and non-Convention states. A closer analysis suggests, however, that the analogy between the margin of appreciation doctrine in Convention jurisprudence and the standard of review to be adopted by the Supreme Court of Canada in reviewing decisions in extradition cases is a good one. Indeed, its application may be even more appropriate in the truly international context of extradition than in the intra-Convention states context. This is because internationally, there is even less consensus on "fundamental values" and greater disagreement over the range of punishments considered to be appropriate than exists among the Convention states. Moreover, the "subsidiarity or local conditions" argument applies with even greater force in the international extradition context. Accordingly, a theory similar to the margin of appreciation doctrine plays an important role in determining the appropriate standard of review of ministerial surrender decisions in extradition cases.

## 6. *Trust in the Requesting State*

The adoption of a residual threshold standard of review rather than a domestic threshold standard is further supported by the argument that there should be a certain degree of trust in the requesting state's ability and willingness to grant the fugitive both procedural and substantive due process.<sup>153</sup> It should not be forgotten that the fugitive is protected by existing procedural and substantive requirements, including the political offense exception,<sup>154</sup> as well as by the rules of specialty<sup>155</sup> and double criminality.<sup>156</sup> Reciprocity

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153. See, e.g., *Argentina v. Mellino* [1987] 1 S.C.R. 536, 554-55 (Can.); *DesFossés v. Canada* (Minister of Justice) [1996] F.C.J. No. 1325, ¶ 22 (Fed. Ct. T.D.) (Can.). This trust in the essential fairness of the requesting state's criminal justice system pervades the extradition system. See *Extradition Act*, R.S.C., ch. E-23, § 16 (1985) (Can.) (requiring no proof with respect to foreign affidavits); *In re McVey* [1992] 3 S.C.R. 475, 526 (Can.) (holding that extradition judge must not examine foreign law or question good faith of foreign authorities).

154. See *Extradition Act* §§ 21-22 (Can.).

155. The rule of specialty provides that a fugitive who has been surrendered for extradition may not be prosecuted by the requesting state for an offense committed before his or her surrender, other than the offense for which he or she was surrendered, without the consent of the surrendering state. See *Extradition Act* § 33 (Can.); *McVey* [1992] 3 S.C.R. at 526-28; *R. v. Parisien* [1988] 1 S.C.R. 950, 956-57 (Can.).

between Canada and foreign states requires that some measure of respect be accorded the fairness of the different rules of a foreign criminal justice system,<sup>157</sup> and it should be presumed (subject to cogent evidence to the contrary) that foreign states will honor their treaty obligations.

Moreover, the courts also must exhibit a degree of trust in the Minister's willingness to protect fugitives' interests.<sup>158</sup> The Minister is entitled to a certain leeway in making surrender decisions. It should be presumed (and, for the most part, experience indicates) that Canada will not negotiate an extradition treaty with a foreign state if it has no confidence in the integrity of the foreign state's criminal justice system.<sup>159</sup> This presumption should, of course, be subject to rebuttal in individual cases on the basis of cogent evidence. Some states do have dubious human rights records. Although there have been few actual cases involving such states, it is not difficult to imagine a scenario that would present Canadian courts with a serious dilemma.<sup>160</sup> Unfortunately, the Supreme Court of Canada has not developed clear guidelines to distinguish the cases in which intervention is warranted from those in which it is not.

### 7. *Executive Discretion Not to Extradite or to Require Assurances*

An additional factor in favor of a residual threshold standard of review is the existence of executive discretion not to extradite a fugitive or to require assurances from the requesting state. Within the framework of existing extradition treaties, the Canadian Government habitually reserves the right not to extradite a fugitive in particular circumstances.<sup>161</sup> The right may be exercised in cases in which the Canadian Government has lost confidence in

156. The rule of double criminality provides that a fugitive may not be surrendered for extradition unless the offense for which extradition is sought is a crime in both the requesting state and the state from which extradition is sought. *See* *Washington v. Johnson* [1988] 1 S.C.R. 327, 340 (Can.).

157. *See* *United States v. Manno* [1997] 112 C.C.C.3d 544, 559 (Que. C.A.) (Can.), *leave to appeal refused*, [1997] 115 C.C.C.3d vi (Can.). This is especially important, given that extradition is treaty-based. *See* *Zingre v. R.* [1981] 2 S.C.R. 392, 409-10 (Can.).

158. *See* *R. v. Schmidt* [1987] 1 S.C.R. 500, 522-23 (Can.); *Doyer v. Downs* (Juge) [1992] 51 Q.A.C. 1, 11 (Que. C.A.) (Can.), *rev'd on other grounds sub nom. United States v. Doyer* [1993] 4 S.C.R. 497 (Can.). The Canadian executive is presumed to have acted in accordance with the Constitution. *See* *Slaight Communications, Inc. v. Davidson* [1989] 1 S.C.R. 1038, 1079-80 (Can.). Of course, this presumption is rebuttable.

159. *See* *Schmidt* [1987] 1 S.C.R. at 522-24. Canada has fewer extradition treaties with a narrower range of states than does the United States.

160. *See, e.g., Mexico v. Hurley* [1997] 116 C.C.C.3d 414 (Ont. C.A.) (Can.) (involving extradition of Canadian citizen to Mexico); *see also* *Canada (M.E.I.) v. Saticum* [1989] 99 N.R. 171, 176 (Fed. C.A.) (Can.) (stating that "[i]n the case of a nondemocratic state, contrary evidence [to the assumption of a fair and independent judicial process] might be readily forthcoming").

161. For recent examples of Canadian practice, *see* *Extradition Treaty*, Mar. 19, 1996, Can.-Switz., art. 3, 1996 Can. T.S. No. 15; *Treaty on Extradition*, Jan. 29, 1995, Can.-S. Korea, art. 4, 1995 Can. T.S. No. 22; *Treaty on Extradition*, Dec. 1, 1991, Can.-Neth., art. 5, 1991 Can. T.S. No. 32; *Treaty of Extradition*, Nov. 12, 1990, Can.-Phil., art. 4, 1990 Can. T.S. No. 36; *Treaty of Extradition*, *supra* note 120, art. 4; and *Treaty of Extradition*, May 31, 1989, Can.-Spain, art. 4, 1990 Can. T.S. No. 39.

the general condition of the requesting state's criminal justice system because of recent events in that state.<sup>162</sup> The decision not to extradite also may be related more directly to the individual case.<sup>163</sup> The ministerial discretion to refuse to surrender a fugitive is not merely a paper tiger. Although it never has been invoked,<sup>164</sup> this may be because Canada has not entered into extradition treaties with states that it feels would not accord an extradited fugitive fair treatment or that have failed to provide sufficient assurances on the basis of which the executive may surrender a fugitive.<sup>165</sup> More use probably could be made of assurances in the extradition process,<sup>166</sup> although it remains an open question whether such assurances would satisfy Charter requirements.<sup>167</sup>

162. The danger that political circumstances may have changed in the requesting state has been noticed in the immigration and refugee context. See *Cheema v. Canada* (M.E.I.) [1991] 15 Immig. L.R.2d 117, 120-21 (Fed. Ct. T.D.) (Can.) (finding deportee entitled to hearing to present claims that return would violate section 7 rights due to changing political circumstances); see also *Hughes*, *supra* note 72, at 319 (stating that "courts would no longer accept the mere existence of a treaty as an indication of a country's integrity when evidence to the contrary exists"). At the same time, however, the mere fact that the government of a foreign state has been replaced is insufficient in itself to enable a fugitive to advance such an argument. Courts in Canada, the United Kingdom, and the United States were faced with this issue in the context of extradition or rendition of fugitives to Hong Kong in the months leading up to the transfer of sovereignty to the People's Republic of China. In each case, the fugitive contended that if he were extradited and convicted upon his return, he would be forced to serve his sentence under Chinese rule, despite the fact that China does not have an extradition treaty with any of the three extraditing states. In each case, the argument was dismissed as speculative. See *United States v. Kin-Hong*, 110 F.3d 103 (1st Cir. 1997); *R. v. Secretary of State for the Home Department* [1997] 1 W.L.R. 839 (H.L.) (appeal taken from Eng.); *Chan c. Directrice de la Maison Tanguay* [1996] R.J.Q. 335 (Que. Super. Ct.) (Can.), *aff'd*, [1996] 113 C.C.C.3d 270 (Que. C.A.) (Can.), *leave to appeal refused*, [1997] 114 C.C.C.3d vi (Can.). The logical consequence of such an argument, of course, would eventually be to suspend or terminate the extradition treaty when the Canadian Government felt that the foreign state was no longer a suitable extradition partner. See *RESTATEMENT*, *supra* note 104, § 477 (stating that extradited person will not be given punishment more severe than that provided by applicable law at time of extradition request).

163. See *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 837 (Can.) (holding that extradition of fugitive to United States for murder is not arbitrary); *United States v. Allard* [1987] 1 S.C.R. 564, 572-73 (Can.) (holding that surrender of fugitives should not infringe on fundamental justice); *Argentina v. Mellino* [1987] 1 S.C.R. 536, 555-58 (Can.) (holding that decision to extradite is compatible with principles of fundamental justice).

164. There have been no known Canadian cases in which such discretion has been exercised. Cf. *Kester*, *supra* note 145, at 1481 (suggesting that there are no known U.S. cases).

165. See *Mellino* [1987] 1 S.C.R. at 558-59 (finding that executive is able to obtain sufficient assurances from foreign country to ensure compliance with requirements of fundamental justice); *Hurley* [1997] 116 C.C.C.3d at 423-26 (discussing surrender of fugitive to face trial in Mexico on basis of assurances by Mexican government).

166. Many commentators advocate a much greater use of assurances. See, e.g., *Shea*, *supra* note 118, at 126-27.

167. See *Barrera v. Canada* (M.E.I.) [1992] 99 D.L.R.4th 264, 279 (Fed. C.A.) (Can.) (suggesting that assurances would be sufficient); *Gervasoni v. Canada* (Minister of Justice) [1996] 72 B.C.A.C. 141, ¶¶ 25-29 (B.C. C.A.) (Can.) (same), *leave to appeal refused*, [1996] 2 S.C.R. vii (Can.); *Garcia v. Canada* (Minister of Justice) [1997] F.C.J. No. 453, ¶ 30 (Fed. Ct. T.D.) (Can.) (same); *DesFossés v. Canada* (Minister of Justice) [1996] F.C.J. No. 1325, ¶ 46 (Fed. Ct. T.D.) (Can.) (same). The Ontario Court of Appeal recently expressed concern that the Minister of Justice should receive assurances from the requesting state in a formal, final, and written form before the Minister surrenders the fugitive. See *Chong v. Canada* (Minister of Justice) [1996] 91 O.A.C. 319, 320 (Ont. C.A.) (Can.), *leave to appeal refused*, [1997] 99 O.A.C. 79 (Can.). Also, where a federal state seeks extradition, there may be some issue as to the value of assurances given by the government of a sub-federal unit. The federal government of the foreign state may, as a matter of its own domestic law, be unable to provide (or enforce) such assurances even

Nevertheless, the determination of whether assurances are necessary or appropriate in a given case is one for the executive. In the absence of demonstrated bad faith, these executive decisions should be afforded considerable deference. A requesting state is unlikely to renege on assurances provided to the Canadian Government concerning individual fugitives, because this would risk disruption of the extradition relationship between the two states.<sup>168</sup>

### III. TREATMENT OF THE FUGITIVE IN THE REQUESTING STATE

#### A. Introduction

Although there are strong arguments in favor of the residual threshold standard, it is not yet clear how it should be applied. In a series of cases,<sup>169</sup> the Supreme Court of Canada adumbrated some general principles, but their implementation has proven remarkably problematic. This difficulty in application is perhaps the greatest challenge facing the residual threshold standard. The lower courts have interpreted *Schmidt* as establishing a relatively high threshold for judicial interference with executive surrender decisions.<sup>170</sup> It seems clear that subsequent cases have not altered the *Schmidt* test.<sup>171</sup> The central question remains: How should Canadian courts determine whether foreign punishment or treatment that falls short of torture violates section 7 of the Charter? The Supreme Court in *Schmidt*, *Kindler*, and *Ng* identified several factors for consideration, upon which the judges favoring surrender for extradition at the court of appeal level in *Jamieson I*, *Ross*, and *Whitley* relied. They are discussed in turn.

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though it is nominally the requesting state for the purposes of the extradition treaty. This issue was addressed in *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 69, at 28 (1989). See also Ronan Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281 (1996) (discussing how federal allocation of jurisdiction creates difficulties in extradition cases).

168. See *Hurley* [1997] 116 C.C.C.3d at 426.

169. See *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779 (Can.); *In re Ng Extradition* [1991] 2 S.C.R. 858 (Can.); *United States v. Allard* [1987] 1 S.C.R. 564 (Can.); *R. v. Schmidt* [1987] 1 S.C.R. 500 (Can.).

170. See *Soffitt v. United States* [1993] 36 B.C.A.C. 155 (B.C. C.A.) (Can.) (denying habeas corpus application); *United States v. Langlois* [1989] 50 C.C.C.3d 445 (Ont. C.A.) (Can.) (holding fugitive could not demonstrate that he had been subject to harassment in foreign state so oppressive that his surrender would violate principles of fundamental justice); *United States v. Vanasse* [1995] O.J. No. 3666 (Ont. Gen. Div.) (Can.) (assessing fitness of fugitive to stand trial). But see *United States v. Turner* [1992] 75 C.C.C.3d 150 (Ont. Gen. Div.) (Can.) (quashing extradition due to violation of fugitive's section 7 rights).

171. See *supra* notes 7-10.

## B. *Difficulty in Applying the "Shocks the Conscience" and "Simply Unacceptable" Tests*

The existing tests for determining whether courts should intervene to quash a ministerial surrender decision in extradition cases are unsatisfactory. The "shocks the conscience" or "simply unacceptable" formulations are merely attempts to articulate a form of the residual threshold standard.<sup>172</sup> The test as set out by the Supreme Court of Canada is not wrong, but its articulation is awkward. Thus, the rhetorical power of the existing tests is outweighed by their lack of precision and clouded by their apparent reference to subjective considerations.<sup>173</sup> The majority judges' post-*Schmidt* cases expressed displeasure with the section 7 tests set out by the Supreme Court of Canada on the grounds that they are vague and difficult to apply. These tests have variously been called criminal penalties or proceedings that are "simply unacceptable,"<sup>174</sup> would "sufficiently shock the conscience," or "offend against the basic demands of justice."<sup>175</sup> Of course, the Supreme Court did attempt to flesh out these more general tests by reference to specific factors, which are examined in this Section.

In a pluralistic country such as Canada, concepts of criminal sentencing such as "shocking," "outrageous," or "unacceptably harsh" are often too ambiguous, subjective, or controversial to be of much use. The difficulty with the existing tests is best demonstrated by the conflicting decisions in the *Jamieson* case itself. In *Jamieson I*, two judges found that Michigan's mandatory minimum sentence did not "shock the conscience," whereas one dissenting judge stated that it did.<sup>176</sup> Conversely, in *Jamieson II*, two judges

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172. The origin of the "shocks the conscience" test is unclear; no authority is provided for it in *Schmidt*. The test appears to originate in the Frankfurter-Black incorporation debate in the United States over whether the Due Process Clause of the Fourteenth Amendment had the effect of applying the Bill of Rights to the states. In *Rochin v. California*, 342 U.S. 165 (1952), the U.S. Supreme Court held that the Fourteenth Amendment did not apply the Fourth Amendment exclusionary rule to the states. Thus, the Court had to decide whether a more limited set of "fundamental rights" contained in the Bill of Rights should apply to the states; they determined that it did. The test adopted by the Court for the purpose of determining whether a fundamental right had been violated by state action was whether the violation "shocks the conscience." See *id.* at 172; *id.* at 175 (Black, J., concurring). The test was much criticized, and the U.S. Supreme Court abandoned it when it later reversed itself and applied the Fourth Amendment exclusionary rule to the states. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Lester v. Chicago*, 830 F.2d 706, 710-11 (7th Cir. 1987). Thus, it is strange that the Supreme Court of Canada should adopt this language. This Article takes the position that for the present purposes, the problem with the "shocks the conscience" test is that it is imprecise, not that it embodies the principle that the scope of constitutional rights can vary according to the particular context at issue.

173. *But see Kindler* [1991] 2 S.C.R. at 850 ("In determining whether, bearing all these factors in mind, the extradition in question is 'simply unacceptable,' the judge must avoid imposing his or her own subjective views on the matter, and seek rather to objectively assess the attitudes of Canadians on the issue of whether the fugitive is facing a situation which is shocking and fundamentally unacceptable to our society.")

174. *Allard* [1987] 1 S.C.R. at 572 (Can.).

175. *R. v. Schmidt* [1987] 1 S.C.R. 500, 522 (Can.).

176. See *Jamieson I* [1992] 73 C.C.C.3d 460, 467 (Que. C.A.) (Can.); *id.* at 473-75 (Proulx, J., dissenting).

found that the mandatory minimum sentencing regime in Michigan "shocks the conscience" and was "unacceptable," whereas the third judge dissented.<sup>177</sup>

This does not mean that there *never* could be a foreign penalty that would be sufficiently outrageous or disproportionate to meet the test. But if reasonable people—and more particularly, appellate court judges—could disagree about its nature, then the foreign penalty could not properly be said to "shock the conscience." The majority in *Ross*, like Justice La Forest in *Schmidt*, identified torture as an example of an unequivocally unacceptable punishment. The *Ross* court held, however, that the torture example demonstrated that "it must be a clear case on which there is unanimity, or something very close to it" in order to ground a finding of "shocking the conscience."<sup>178</sup> These difficulties emphasize the need for more objective factors to demonstrate the incontrovertible nature of the "shock." To some extent, international human rights law provides a more objective footing upon which to establish such factors. As seen below, however, it provides few useful guidelines for a proportionality analysis.

The minority position, represented by Justice Proulx dissenting in *Jamieson I*, Justice Lambert dissenting in *Ross*, and the majority in *Jamieson II*, was that it would shock the conscience, be simply unacceptable, or be fundamentally unjust to extradite the fugitives to face the foreign mandatory minimum sentencing regimes for the respective offenses.<sup>179</sup> Although these judges did not adopt a test different from that of the majority, they reached contrary results, giving their views the appearance of being subjective and impressionistic. In *Ross*, Justice Finch noted that although in applying the tests judges purport to ascribe the views therein to a majority of Canadian citizens, "[o]n my reading of the cases it seems to come down to a question

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177. See *Jamieson II* [1994] 93 C.C.C.3d 265 (Que. C.A.) (Can.), *rev'd*, Canada (Minister of Justice) v. *Jamieson* [1996] 1 S.C.R. 465 (Can.); see also *Kindler* [1991] 2 S.C.R. at 856 (McLachlin, J., concurring). Justice McLachlin compared the decision by the European Commission of Human Rights in *Kirkwood v. United Kingdom*, in which extradition to the United States to face the death penalty was permitted, to that of the European Court in *Soering*, in which extradition was refused, to illustrate "the complexity of the issue" and to support a deferential judicial stance towards executive extradition decisions. See *Kindler* [1991] 2 S.C.R. at 856. Professor Schabas is right to criticize Justice McLachlin's use of the European Convention jurisprudence here: *Soering* overruled *Kirkwood*. But the inconsistency that Justice McLachlin identified is not irrelevant, as Professor Schabas argues. See Schabas, *supra* note 86, at 922 n.69. The very fact that the Commission could come to the opposite result in a reasoned decision illustrates that extradition to face the death penalty is not "beyond the pale" or "shocking" in the same way that extradition to face torture would be. See *Altun v. Germany*, App. No. 10308/83, 5 Eur. H.R. Rep. 611 (1983) (Commission report) (discussing risk of torture to which fugitive may be subjected if extradited to Turkey). In any event, the inconsistencies between the results and reasoning in the two *Jamieson* cases cannot be explained away in the same manner: The same court (the Quebec Court of Appeal) decided both cases.

178. *United States v. Ross* [1994] 119 D.L.R.4th 333, 372 (B.C. C.A.) (Can.).

179. See *Ross* [1994] 119 D.L.R.4th at 359 (Lambert, J., dissenting); *Jamieson II* [1994] 93 C.C.C.3d at 265; *Jamieson I* [1992] 73 C.C.C.3d at 474-75 (Proulx, J., dissenting).

of whether the *judges* are shocked, outraged, or find unacceptable the foreign law or sentencing regime.”<sup>180</sup>

Another unsettled issue is the role that public opinion should play in the determination of whether surrender for extradition would “shock the conscience” or be “simply unacceptable.” Both the majority and minority judges attempted to support their decisions by reference to public opinion, as the Supreme Court had done in *Kindler*.<sup>181</sup> In his dissenting opinion in *Kindler*, Justice Sopinka expressed concern that “[p]rinciples of fundamental justice not be limited by public opinion of the day.”<sup>182</sup> This is certainly a valid concern.<sup>183</sup> Justice Sopinka’s approach suggests that he would resist a public opinion-based definition of “shock the conscience,” although it is unclear what he would propose as a substitute.<sup>184</sup> The more plausible explanation, however, is that the majority of the *Kindler* Court invoked public and legislative opinion merely as evidence to demonstrate that the foreign sentence in the circumstances was not “incontrovertibly shocking.”

The existing “shock the conscience” and “simply unacceptable” standards are too vague to be useful. The better approach is to establish a high threshold so that conduct must be “incontrovertibly shocking” for a ministerial surrender order to be quashed. As suggested above, this minimal baseline may be established by reference to international human rights law.<sup>185</sup> At present, this baseline would be limited to a few incontrovertible propositions, such as the prohibitions against torture, slavery, inhumane prison conditions, unfair trials, and discrimination. These are the “core of elementary human rights . . . .”<sup>186</sup> The category of “incontrovertibly shocking” punishments is not complete. As new international conventions arise, and international opinion and practice solidifies into customary international law, the

180. Ross [1994] 119 D.L.R.4th at 371 (emphasis added).

181. See *Kindler* [1991] 2 S.C.R. at 832, 852; see also *United States v. Whitley* [1994] 119 D.L.R.4th 693, 713 (Ont. C.A.) (Can.) (“I do not think that the majority of reasonably well-informed Canadians would find that the appellant faces a situation in the State of New York that shocks the conscience or that is simply unacceptable.”); *Jamieson II* [1994] 93 C.C.C.3d at 284 (“In short, it is my view that the majority of (though of course not all) reasonably well-informed Canadians would consider that appellant faces a situation in Michigan that shocks the conscience and is simply unacceptable.”).

182. *Kindler* [1991] 2 S.C.R. at 791 (Sopinka, J., dissenting); see also Ross [1994] 119 D.L.R.4th at 344 (Lambert, J., dissenting) (stating that assessment of Canadian public opinion “is not a matter for polls”).

183. See Klinck, *supra* note 71, at 206–07.

184. Perhaps Justice Sopinka had in mind something similar to the test for exclusion of evidence under section 24 of the Charter, which seeks to avoid bringing the administration of justice into disrepute. See *R. v. Collins* [1987] 1 S.C.R. 265, 280–88 (Can.). Note that the threshold is not the same in the two situations. *Collins* indicates a lower threshold for the exclusion of evidence than the “shock the conscience” standard in extradition cases.

185. See *Chan v. Canada (M.E.I.)* [1995] 3 S.C.R. 593, 635 (Can.) (La Forest, J., dissenting) (“The essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way . . . . Such rights transcend subjective and parochial perspectives and extend beyond national boundaries.”).

186. Theo Vogler, *The Scope of Extradition in Light of the European Convention on Human Rights*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION* 663, 668 (Franz Matscher & Herbert Petzold eds., 1988).

category will grow, and the protection afforded to fugitives gradually will increase.

Amanda Spencer has contended that the current tests under section 7 set out by the Supreme Court of Canada are too vague and imprecise to provide workable guidelines.<sup>187</sup> She proposes instead that the content of section 7 rights afforded to a fugitive should be explained by reference to the rights enumerated in sections 8–14 of the Charter. In this way, she argues, the rather ethereal concepts of “shock the conscience” and “simply unacceptable” can be brought down to earth and given form. But even she acknowledges that a fugitive facing extradition would not enjoy the full protections of sections 8–14. The Court’s standard of review would have to be “modified somewhat to reflect the international context of extradition cases.”<sup>188</sup> She does not explain, however, exactly how this process of “modification” should take place. Presumably, more leeway would have to be given the modifying words in sections 8–14. For example, what is “reasonable”<sup>189</sup> or “arbitrary”<sup>190</sup> in the domestic sphere might not be so in the extradition context.<sup>191</sup>

Spencer is of course right to point to sections 8–14 of the Charter as more specific indicia of what Canadians consider to be the elements of fundamental justice under section 7. The residual threshold standard demands that fugitives not be accorded the full protections of sections 8–14 on a domestic level. Denying a fugitive full rights under sections 8–14 does not mean throwing him or her to the wolves, however. Canadian judges can, when possible, look to international human rights standards, many of which are similar to, indistinguishable from, or even the basis of rights under sections 8–14. Although this distinction may seem academic, it only emphasizes the point that some Charter rights overlap with international human rights law norms, while others do not.

Section 7 review is guided by a number of factors, the most important of which are sections 8–14, international and comparative law, and the common law.<sup>192</sup> The key concern is to dispel the notion of Charter univer-

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187. See Spencer, *supra* note 14, at 79.

188. *Id.*; see also *États-Unis c. Tavormina* [1996] R.J.Q. 693, 707 (Que. C.S.) (Can.) (stating that sections 8–14 of Charter are inapplicable to extradition proceedings), *aff’d on other grounds*, [1996] 112 C.C.C.3d 563 (Que. C.A.) (Can.).

189. Charter §§ 8, 11(a), 11(b), 11(e).

190. Charter § 9.

191. See *Kindler v. Canada* [1991] 2 S.C.R. 779, 844 (Can.) (McLachlin, J.) (“While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.”).

192. This does not mean that rights under sections 8–14 are subsumed under section 7. See *In re ss. 193 & 195.1 of the Criminal Code (Man.)* [1990] 1 S.C.R. 1123, 1178 (Can.) (stating that it is neither wise nor necessary to subsume all other rights in Charter under section 7). Section 7 may provide a sort of “residual protection” to the interests that otherwise would be protected by a specific right under sections 8–14. See *Thomson Newspapers Ltd. v. Director of Investigation & Research* [1990] 1 S.C.R. 425, 537 (Can.). On the application of the more flexible criteria of section 7 where section 11 does not apply, see *R. v. Shubley* [1990] 1 S.C.R. 3, 23–24 (Can.).



salism. Important rights exist independently of the Charter, international human rights law being a prime example. In many cases, these rights may overlap or merge into existing Charter rights. The protection granted by many Charter rights is in most cases greater than that required under international human rights law.<sup>193</sup> The standard for some Charter rights may be set at a level closer to the more minimal requirements of international law. In the extradition situation, the pressing needs of a functioning extradition system may provide the proper context for the determination of the rights of fugitives and suggest that those rights are best set at a level that corresponds to an international, rather than a purely domestic, standard.

### C. *Procedural Elements of Review*

#### 1. *Degree of Scrutiny of Foreign Law and Evidence of Human Rights Violations in the Requesting State*

To exercise judicial review of the ministerial discretion to surrender a fugitive for extradition, courts must examine foreign criminal justice systems to see how the fugitive would be treated.<sup>194</sup> This surely will result in a certain degree of expense and delay.<sup>195</sup> Moreover, there are also concerns about the negative implications of evaluating the "fairness" of a foreign legal system, although these concerns are easily exaggerated. That said, there is no viable alternative to conducting such an examination; otherwise, the court will have adopted a de facto rule of non-inquiry. Once the decision has been made to examine the conditions that the fugitive might face in the requesting state, the real question becomes what the standard of review should be for this narrow purpose.

Courts are already familiar with the need to examine foreign legislation in the extradition context.<sup>196</sup> Indeed, some courts have indicated that they would refuse to permit surrender of a fugitive for extradition where foreign law was not complied with, although perhaps this is going too far.<sup>197</sup> The

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193. See *Slaight Communications, Inc. v. Davidson* [1989] 1 S.C.R. 1038, 1056 (Can.).

194. This would likely take place by way of an affidavit of an expert witness. See, e.g., *Chan c. Directrice de la Maison Tanguay* [1996] 113 C.C.C.3d 270, 300-02 (Que. C.A.) (Can.), *leave to appeal refused*, [1997] 114 C.C.C.3d vi (Can.). In that case, a fugitive sought to adduce evidence that her extradition to Hong Kong on a murder charge would violate section 7 of the Charter and section 16 of the Fugitive Offenders Act, in part because the transfer of Hong Kong to Chinese control after July 1, 1997 would imperil her rights. The court allowed evidence to be presented on the point but was of the view that the fugitive had not met her burden of proof. On a habeas corpus application concerning extradition, a court may hear expert evidence by affidavit on the law and practice of a friendly foreign state to determine whether that state has a law or practice constituting cruel and unusual punishment. See *United States v. Berladyn* (No. 1) [1992] 14 B.C.A.C. 302, 303 (B.C. C.A.) (Can.).

195. See *United States v. McVey* [1992] 3 S.C.R. 475, 528-29 (Can.) (stating that extradition judge must not examine foreign law).

196. See *McVey* [1992] 3 S.C.R. at 514.

197. See *United States v. Knox* [1995] 28 W.C.B.2d 362 (Ont. Gen. Div.) (Can.) (holding that Charter protects fugitive from being surrendered to face sentence that is illegal under foreign law). This

majority judges at the court of appeal in *Jamieson I*, *Ross*, and *Whitley* were prepared to examine foreign law. But, as the Supreme Court had admonished in *Kindler*,<sup>198</sup> they were careful not merely to apply Charter norms directly to the foreign sentencing regimes. Clearly, the standard of review is a crucial consideration.

The court of appeal judges who held that surrender for extradition was unconstitutional undertook a more intrusive examination of the foreign case law to determine how the foreign sentencing regimes were likely to apply to the fugitives. Justice Proulx's review of Michigan state law in *Jamieson I* led him to the conclusion that there were no factors in the case amounting to "substantial and compelling reasons" under Michigan law that would enable a Michigan court to depart from the mandatory minimum sentence.<sup>199</sup> This indicates, perhaps not surprisingly, that the more deeply the court delves into the details of foreign law, the more the foreign legal system is likely to appear different and, in many cases, incompatible with Charter norms. Moreover, one wonders how far Canadian courts should go in coming to their own determinations as to how foreign courts would apply foreign law, particularly in an area of law as complicated and dependent upon a range of factors as sentencing.<sup>200</sup> This is not to say that there will not be a few clear cases that warrant intervention by the courts. But Canadian courts should have a healthy skepticism about their own abilities to navigate the intricacies of foreign law.<sup>201</sup>

Some degree of evaluation of foreign law by courts engaging in judicial review of ministerial surrender decisions is unavoidable,<sup>202</sup> albeit likely on a different standard than that employed in a purely domestic context. Justice La Forest indicated in *Schmidt* that in the extradition context, "judicial intervention must be limited to cases of real substance."<sup>203</sup> A better understanding of what it might mean to look at the foreign criminal justice system "as a whole" can be gained by examining a U.S. case, *United States ex rel. Bloomfield v. Gengler*.<sup>204</sup> U.S. citizens were charged in Canada for conspiracy to import, export, and traffic in hashish. The case against them was dismissed at trial. Although the Crown appealed with the full knowledge of the defendants, they returned to the United States. The Crown's appeal was al-

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seems to be an anomalous decision, according to the logic of *McVey*. See *McVey* [1992] 3 S.C.R. at 528 (holding that courts are not to receive evidence of foreign law).

198. See *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 844-45 (Can.).

199. See *Jamieson I* [1992] 73 C.C.C.3d 460, 473 (Que. C.A.) (Can.).

200. See *R. v. Schmidt* [1987] 1 S.C.R. 500, 533-34 (Wilson, J., concurring). Similarly, in conflict of laws cases, there seems to be an increasing tendency to regard the fact that a cause of action or case will be governed by foreign law as one reason to stay proceedings in favor of trial abroad according to the doctrine of *forum non conveniens*. See *E.I. du Pont de Nemours v. Agnew* [1987] 2 Lloyd's Rep. 585 (Eng. C.A.); *Charm Maritime, Inc. v. Kyriakou* [1987] 1 Lloyd's Rep. 433 (Eng. C.A.).

201. See *United States v. Lépine* [1994] 1 S.C.R. 286, 296 (Can.); *McVey* [1992] 3 S.C.R. at 528-29.

202. See James W. O'Reilly, Case Comment, *Ng and Kindler*, 37 MCGILL L.J. 873, 885 (1992).

203. *Schmidt* [1987] 1 S.C.R. at 523.

204. *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925 (2d Cir. 1974).

lowed and a conviction entered against the defendants in their absence. At the instigation of Canadian authorities, the defendants were arrested in the United States, and the Canadian Government then sought their extradition.

The fugitives sought to resist extradition to Canada on the grounds that the Canadian legislation that allowed the Crown to appeal from an acquittal at trial did not accord with U.S. law.<sup>205</sup> The court held that although the circumstances of the case bore an initial resemblance to conviction in absentia, on closer examination it was apparent that the defendants voluntarily had chosen to leave Canada before the final resolution of the case against them. The court conceded that there might be situations in which extradition would offend its sense of decency but ruled that this was not such a case.<sup>206</sup> *Gengler* illustrates that U.S. courts have determined that extradition will be allowed even where the requesting state's criminal justice system differs from the domestic one, so long as the court is confident that the fugitive will receive a fair trial in the requesting state. The lesson for Canadian courts is that a "fair trial" need not be identical to a domestic one. A foreign trial may be fair even though its procedural rules deviate from Canadian constitutional norms.<sup>207</sup>

## 2. *What Must the Fugitive Demonstrate?*

The residual threshold standard necessarily entails a debate over the proper evidentiary threshold that the fugitive must surmount to invoke successfully the aid of the court. Once the courts indicate that there are circumstances in which they are prepared to intervene, the question arises as to what a fugitive must demonstrate to place his or her case within the residual category. Too low a threshold risks submerging the courts in a sea of meritless applications for judicial review; too high a threshold is blind to the reality that the fugitive has been assigned a task that is almost inevitably speculative.

The willingness of the European Court in *Soering* to advance a doctrine that would enable it to quash surrender decisions where a fugitive faces objectionable treatment or punishment abroad required it to define the circumstances in which such discretion would be exercised.<sup>208</sup> A court exercising review of a surrender decision makes a prospective determination of the risk

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205. Cf. MARTIN L. FRIEDLAND, *DOUBLE JEOPARDY* 279-84 (1969) (discussing Crown's ability to appeal from acquittal).

206. Cf. *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960) (holding that extradition of person convicted in absentia did not violate federal court's sense of decency).

207. See *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 845 (Can.) ("We require a limited but not absolute degree of similarity between our laws and those of the reciprocating state."); *Zingre v. R.* [1981] 2 S.C.R. 392, 408 (Can.) ("One should be wary of analysing the Swiss judicial system using our model.").

208. Regrettably, some commentators who advocate an expanded role for the judiciary in extradition cases sidestep this issue. See Quigley, *supra* note 142, at 1222 n.65.

that the fugitive faces in the requesting state,<sup>209</sup> and the prospective nature of the exercise compounds the already difficult task facing the court.<sup>210</sup> What degree of risk must the fugitive establish—certainty, likelihood, a possibility? The *Soering* court was satisfied with a “substantial grounds” test.<sup>211</sup> John Pak, however, advocates a “certainty” test, although it becomes a “likely” test at points in his discussion.<sup>212</sup>

The fugitive’s burden of proof is important for another reason: If the fugitive discharges the burden, he or she will have established a nexus between the action of the Canadian Government in surrendering a fugitive for extradition and the actions of the government of the requesting state in subjecting the fugitive to punishment. The Supreme Court of Canada in *Kindler* contended that section 12 of the Charter has no application to judicial review of ministerial surrender decisions because “the effect of any Canadian law or government act is too remote from the possible imposition of the penalty complained of to attract the attention of s. 12.”<sup>213</sup> Thus, the question of remoteness is intimately connected with questions of state responsibility and Charter application. It is essential, therefore, that a fugitive be required to demonstrate a sufficient level of certainty that he or she will face a constitutionally objectionable form of treatment or punishment in the requesting state in order to implicate both Canada’s responsibility on the international plane and the application of the Charter at the domestic level.

What, then, must the fugitive demonstrate? On the one hand, it seems unlikely (except in cases where he or she has already been convicted in the requesting state but has fled and is sought by the requesting state for punishment) that a fugitive will be able to demonstrate that it is “certain” that he or she will face objectionable treatment or punishment. On the other hand, something more than the mere “possibility” of facing such treatment or punishment should be required to allay causation and remoteness concerns. The immigration context supplies a helpful analogy: Canadian courts have interpreted the “well-founded fear of persecution” test to determine whether an individual is a Convention refugee.<sup>214</sup> A “well-founded fear of persecu-

209. Cases where the fugitive has already been convicted abroad, and is being sought by the requesting state for punishment, may present fewer difficulties, but even then many questions remain.

210. See *Chan v. Canada (M.E.I.)* [1995] 3 S.C.R. 593, 618–19 (Can.).

211. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 91, at 35 (1989).

212. See John Pak, *Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life*, 26 CORNELL INT’L L.J. 239, 273 (1993) (“Only where the fugitives’ return to the United States would likely result in the imposition and execution of the death penalty, would such extradition violate the Charter.”).

213. *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779, 846. There is nothing wrong with such an approach in theory, but it may be simply too weak in its application. At the very least, it begs the question of when the penalty would *not* be too remote. On this point, see Pak, *supra* note 212, at 259, which asks: “Would the degree of physical proximity or degree of exigency determine the required remoteness necessary to trigger Section 12’s constitutional protection?”

214. The Federal Court of Appeal interpreted “well-founded fear” to mean a “reasonable chance” in *Adjei v. Canada (M.E.I.)* [1989] 57 D.L.R.4th 153 (Fed. C.A.) (Can.). Thus, an individual claiming refugee status need not demonstrate a probability (more than 50% likelihood) of persecution but need only establish (on a balance of probabilities) that there is a reasonable chance of persecution. See Ponniah v.

tion" test also would be appropriate in the extradition context.<sup>215</sup> Such an approach would dovetail with the test adopted by the Supreme Court of Canada in *Chan*,<sup>216</sup> in which the Court held that a claimant must demonstrate a "serious possibility" of persecution in the foreign state in order to resist deportation there.<sup>217</sup> The Supreme Court of Canada has used similar language in addressing anticipated violations of the Charter more generally.<sup>218</sup>

The fugitive will not satisfy the burden of proof merely by reciting evidence of isolated human rights violations in the requesting state, if only because no state in the world has a spotless human rights record. The more democratic the government of the requesting state, the more difficult the fugitive's task. Moreover, the risk of which the fugitive complains must exist at the time of surrender for extradition, not merely at some earlier point.<sup>219</sup>

### 3. Application of Section 12 of the Charter

In *Kindler*, the Supreme Court of Canada took the controversial view that section 12 of the Charter<sup>220</sup> does not apply to judicial review of ministerial decisions in extradition cases.<sup>221</sup> The *Kindler* Court denied that section 12 applied to the treatment that a fugitive would face in the requesting state after surrender for extradition because any such punishment would not be

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Canada (M.E.I.) [1992] 32 N.R. 32, 34 (Fed. C.A.) (Can.) (explaining *Adjei* test as requiring something more than minimal possibility but not as high as a greater-than-50% probability); see also *Chichmanov v. Canada* (M.E.I.) [1992] F.C.J. No. 832 (Fed. C.A.) (Can.) (applying *Ponniah* standard). The *Adjei* court rejected the "substantial grounds for thinking" test adopted by the Law Lords in *R. v. Secretary of State for the Home Dep't* [1988] 1 All E.R. 193, 198 (H.L.) (Eng.). Note, however, that the Supreme Court of Canada in *Chan* seems to have preferred this latter "serious possibility" test to the "reasonable possibility" standard set forth in *Adjei*, see *Chan* [1995] 3 S.C.R. at 659, although a close reading of *Sivakumar v. Canada* (M.C.I.) [1996] 2 F.C. 872 (Fed. C.A.) (Can.) indicates that the two tests are probably the same.

215. See INTERNATIONAL LAW ASS'N, REPORT OF THE SIXTY-SIXTH CONFERENCE 158-59 (1994).

216. See *Chan* [1995] 3 S.C.R. at 659 (holding that appellant seeking status as Convention refugee must demonstrate well-founded fear of persecution stemming from political opinion or membership in particular social group).

217. Similarly, in *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), the European Court of Human Rights observed: "The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3." *Id.* ¶ 88, at 34 (emphasis added). By comparison, article 3 of the Torture Convention requires "substantial grounds for believing that [the fugitive] would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, June 26, 1987, art. 3, 1465 U.N.T.S. 85 [hereinafter Torture Convention] (emphasis added).

218. See *Phillips v. Nova Scotia* (Comm'n of Inquiry into the Westray Mine Tragedy) [1995] 124 D.L.R.4th 129, 174 (Can.) (equating test of "high degree of probability" with that of "real and substantial risk" and observing that "relief will only be granted in circumstances where the claimant is able to prove that there is a sufficiently serious risk that the alleged violation [of a Charter right] will in fact occur").

219. See *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, ¶¶ 83-86 (1997) (Eur. Ct. H.R.).

220. Charter § 12 ("Everyone has the right not to be subjected to any cruel and unusual punishment or treatment.").

221. See, e.g., Ian Lee, *La règle du «tiers pays sûr» au regard de l'article 12 de la charte canadienne*, 73 CAN. B. REV. 372, 377 (1994).

imposed by the Canadian Government.<sup>222</sup> It thus rejected the approach to state responsibility that the European Court of Human Rights had adopted in *Soering*.

The court of appeal judges who found surrender for extradition unconstitutional in *Jamieson I*, *Ross*, and *Whitley* argued that the mandatory minimum sentences in question would not pass muster in Canada because they would violate section 12 of the Charter.<sup>223</sup> In *Jamieson II*, Justice Fish contended that the Supreme Court in *Kindler* had determined that, although it has no direct application to the ministerial surrender decision, section 12 provides guidance for determining appropriate standards under section 7, which does apply to the surrender decision. He concluded that the foreign punishment in *Jamieson II* was so excessive as to "shock the conscience" and thus violate section 7. It is difficult, however, to distinguish this analysis from the actual application of section 12 according to a domestic standard to the extradition decision.

The essential problem faced by the majority in *Kindler* was this: The court had indicated in previous decisions that section 7 and section 12 violations are almost impossible to uphold under section 1.<sup>224</sup> Accordingly, the majority could have adopted one of three interpretative strategies in determining whether the ministerial surrender decision in that case contravened section 7, section 12, or both. First, the Court might have conceded that the fugitive's section 7 and/or section 12 rights had been violated. According to existing case law, this would, of course, effectively have precluded recourse to section 1 and thus rendered surrender for extradition unconstitutional.<sup>225</sup> Given that the majority sought to uphold the constitutionality of surrender for extradition in the circumstances, it saw two alternatives: either conclude that section 12 and/or section 7 do not apply to extradition at all or conclude that section 12 and/or section 7 must be defined contextually so that they are not necessarily violated by surrender for extradition.

In the end, the Court combined the two strategies, finding that section 12 simply did not apply to extradition but defining section 7 in a contextual fashion so that it was not violated by the surrender decision. This result was both murky and unsatisfactory. The values embodied in section 12 cannot be

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222. For example, Justices La Forest and McLachlin agreed in separate opinions that actions taken by the United States do not implicate Canada in violations of section 12. See *Kindler v. Canada* [1991] 2 S.C.R. 779, 831 (La Forest, J., concurring); *id.* at 846 (McLachlin, J., concurring).

223. See *R. v. Smith* [1987] 1 S.C.R. 1045, 1061 (Can.) (discussing section 12 and relying upon international human rights conventions to flesh out its meaning). The *Smith* test for review of sentences under section 12 is one of "gross disproportionality." *Id.* at 1072-73.

224. Note, however, that in *Smith* [1987] 1 S.C.R. at 1079-81, Justice Lamer went through a section 1 analysis. Although he concluded that the minimal impairment element of the *Oakes* test was not satisfied, he did not indicate that a section 12 violation could never be upheld under section 1. *Id.* There seems to be no inherent reason why violations of section 7 cannot be upheld under section 1 in appropriate circumstances. See HENRI BRUN & GUY TREMBLAY, *DROIT CONSTITUTIONNEL* 915 (2d ed. 1990). Admittedly, the circumstances in which such violations could be upheld would be rare.

225. An argument based upon an international public interest rationale might be successful under section 1. See *supra* text accompanying note 71.

ignored because they infuse section 7<sup>226</sup> and because the section 12 and section 7 tests are practically indistinguishable.<sup>227</sup> The point advanced here is simply that section 12 values are important, but that there are a number of other factors to be considered under section 7 as well.<sup>228</sup> It would have been preferable for the *Kindler* Court to have adopted a contextual approach to section 12 as well as to section 7. According to this approach, section 7 and section 12 both would apply to the surrender decision, but they would not necessarily have been violated by it.

Instead, the *Kindler* majority was forced to contend that section 12 did not apply to ministerial surrender decisions because the Charter does not have extraterritorial effect. Needless confusion has resulted. First, strictly speaking, it is not clear that the principle advanced by the Court is accurate. The Supreme Court was careful to leave the question open in *R. v. Harrer*,<sup>229</sup> and even Justice McLachlin's own opinion for the Court in the recent *R. v. Terry*<sup>230</sup> decision does not require such a conclusion. The more accurate proposition is that the Charter does not govern the acts of foreign governments. Whether the Charter governs the acts of Canadian Government officials outside Canada is a distinct question that remains open, and there is good reason to believe that the answer is yes, at least in certain circumstances.<sup>231</sup>

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226. See *Kindler* [1991] 2 S.C.R. at 847; *In re The Constitutional Question Act* [1985] 2 S.C.R. 486, 487 (Can.) (holding that interpretation of "principles of fundamental justice" in section 7 must be informed in part by section 12). It seems hard to imagine that a section 12 violation could ever be upheld under section 1, because "it is difficult to conceive of a penalty that is shocking to the conscience [section 7], that would not also constitute cruel and unusual punishment [section 12]." LA FOREST, *supra* note 3, at 203; see also HOGG, *supra* note 150, at 35-38 (providing overview of rights protected by section 7). The factors used to determine whether there has been a violation of section 12 bear a remarkable resemblance to the section 7 test in the extradition context (e.g., (i) gravity of the offense; (ii) circumstances of the case; (iii) personal characteristics of the offender; (iv) effect of the sentence on the offender). Thus, section 12 seems at least somewhat relevant to the section 7 inquiry. See *United States v. Dibben* [1996] A.Q. No. 1340, ¶ 26 (Que. C.A.) (Can.) (Fish, J., concurring) (stating that section 12, although itself insufficient to quash an extradition order, is relevant to a determination under section 7), *leave to appeal refused*, [1996] 3 S.C.R. vii (Can.).

227. See Lee, *supra* note 221, at 383.

228. See *Kindler* [1991] 2 S.C.R. at 847; Donald K. Piragoff & Marcia V.J. Kran, *The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts*, 3 CRIM. L.F. 225, 252-53 (1992) (identifying several other values). The Supreme Court has repeatedly emphasized that the principles of fundamental justice involve a balancing of a variety of societal and individual interests. See, e.g., *R. v. O'Connor* [1995] 4 S.C.R. 411, 458-59 (Can.).

229. [1995] 3 S.C.R. 562, 570-71 (Can.).

230. [1996] S.C.R. 207 (Can.).

231. See *Schreiber v. Canada* (Attorney General) [1996] 108 C.C.C.3d 208 (Fed. C.A.) (Can.) (applying Charter to Canadian official's request to search Swiss banking documents), *aff'd*, [1997] 144 D.L.R.4th 711 (Fed. C.A.) (Can.), *leave to appeal granted*, [1997] 149 D.L.R.4th vii (Can.); *R. v. Cook* [1996] 112 C.C.C.3d 508, 520-21 (B.C. C.A.) (Can.) (applying Charter to interrogation by Canadian police officers of accused person in United States regarding offense committed in Canada), *leave to appeal granted*, [1997] 116 C.C.C.3d vi (Can.).

Second, the extraterritoriality debate is a red herring.<sup>232</sup> On the one hand, it is clear that section 12 does not apply directly to the punishment that would be inflicted by the requesting state because it would not be inflicted by the Canadian Government. Yet at the same time, it cannot be denied that the Canadian Government's decision to surrender a fugitive to face punishment or treatment abroad gives rise to state responsibility in international law if that treatment violates international human rights norms. This is the gravamen of *Soering*.<sup>233</sup> An administrative decision in Canada that foreseeably leads to punishment or treatment abroad must be subject to Charter scrutiny.

The proper question is whether the acts performed *in Canada* by the Canadian Government, such as ordering the surrender of a fugitive for extradition to face possible rights violations in the requesting state, constitute punishment or treatment for the purposes of section 12. Despite the statements of Justices McLachlin and La Forest on this point in *Kindler*, it is difficult to see how extradition to face such treatment is not *itself* treatment or conduct imputable to the Canadian Government, at least where, as discussed above,<sup>234</sup> the fugitive demonstrates a "serious possibility" that he faces such treatment or conduct.<sup>235</sup> How is it that section 12 is not implicated by the surrender of a fugitive for extradition, but section 7 is? The extraterritoriality and remoteness issues are identical.<sup>236</sup> The real issue is whether section 12 applies as a domestic standard when the punishment or treatment is to be rendered abroad, not whether section 12 applies at all.

Justice McLachlin's implicit assumption seems to have been that section 12 concerns only the criminal process, and since extradition is not strictly criminal in nature, section 12 consequently did not apply. But the Supreme Court of Canada has on other occasions indicated that deportation might be "treatment" for the purposes of section 12,<sup>237</sup> and a number of

232. See *Kindler* [1991] 2 S.C.R. at 799 (Cory, J., dissenting) (arguing that extradition decisions are subject to Charter scrutiny despite problem of extraterritoriality); *R. v. Schmidt* [1987] 1 S.C.R. 500, 532-33 (Can.) (Wilson, J., concurring); Allan Manson, *Kindler and the Courage to Deal with American Convictions*, 8 C.R.4th 68, 69-71 (1992) (arguing that extraterritoriality is not obstacle to enforcing Charter).

233. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 91, at 35 (1989).

234. See *supra* note 214 and accompanying text.

235. See Mark Anthony Drumbl, *Canada's New Immigration Act: An Affront to the Charter and Canada's Collective Conscience?*, 24 R.D.U.S. 385, 402 (1994) (arguing that extraterritoriality is consistent with Charter's purpose); Lee, *supra* note 221, at 376; André Morel, *Les garanties en matière de procédure et de peines*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 12-1, 12-61 (Gérald-A. Beaudoin & Errol Mendes eds., 3d ed. 1996).

236. See Hathaway & Neve, *supra* note 14, at 241.

237. See *Rodriguez v. British Columbia (A.G.)* [1993] 3 S.C.R. 519, 608-12 (Can.). The language that Justice Sopinka uses to describe deportation could apply equally to extradition. Though not penal in nature, deportation is the result of the enforcement of "a state administrative structure" so that "any 'treatment' was still within the bounds of the state's control over the individual within the system set up by the state." *Id.* at 610; see also *Chiarelli v. Canada (M.E.I.)* [1992] 1 S.C.R. 711, 735 (Can.) (suggesting, without deciding, that deportation might be included within definition of treatment).



lower courts have followed suit.<sup>238</sup> Indeed, at least one lower court has proceeded on the basis that section 12 might apply to extradition, although it declined to find a violation on the facts.<sup>239</sup> The European Court in *Soering* framed the issue more appropriately by looking at the foreseeability of punishment or treatment abroad.<sup>240</sup>

The operation of section 12 of the Charter in the context of a residual threshold standard of review is a delicate matter. Even in purely domestic cases, the Supreme Court of Canada has experienced some difficulty in evaluating the constitutional status of mandatory minimum sentences under section 12 of the Charter. In *R. v. Smith*,<sup>241</sup> the Court adopted a test that subjected mandatory minimum sentences to evaluation using a hypothetical set of facts: If circumstances could be imagined in which the mandatory minimum sentence would be grossly disproportionate, it would not withstand constitutional scrutiny. On this basis, the Court struck down a seven-year sentence for importation of narcotics, even though on the facts of the case it was difficult to identify gross disproportionality. The upshot of *Smith*'s hypothetical approach to constitutional adjudication was that few, if any, mandatory minimum sentences could withstand constitutional challenge.

Perhaps troubled by this result, the Supreme Court backed away from the *Smith* test in *R. v. Goltz*.<sup>242</sup> There, the Court upheld a mandatory minimum sentence of seven days' imprisonment for driving while prohibited from doing so. The *Goltz* Court indicated that the hypothetical test propounded in *Smith* must be based on facts that are "reasonable" and not "far fetched." Thus, a sentencing provision should be struck down under section

238. See *Sivakumar v. Canada* (M.C.I.) [1996] 2 F.C. 872 (Fed. C.A.) (Can.) (stating that deportation of non-Convention refugee to state where he would face serious risk of harm presents "serious issue" to be tried and may violate section 7 and/or section 12); *Nguyen v. Canada* (M.E.I.) [1993] 100 D.L.R.4th 151, 160 (Fed. C.A.) (Can.) (finding that deportation of refugee to face possible torture and death would violate section 7 and probably section 12 as well); *Grewal v. Canada* (M.E.I.) [1991] 85 D.L.R.4th 166, 171 (Fed. C.A.) (Can.) (holding that deportation of permanent resident implicates section 7 rights without violating them); see also *Barrera v. Canada* (M.E.I.) [1992] 99 D.L.R.4th 264, 273-79 (Fed. C.A.) (Can.) (stating that deportation of Convention refugee to homeland could violate section 12, but section 7 not engaged); *Hoang v. Canada* (M.E.I.) [1990] 13 Immig. L.R.2d 35 (Fed. C.A.) (Can.) (holding that deportation of Convention refugee does not engage section 7 rights but not addressing question of whether deportation could be cruel and unusual "treatment" as opposed to "punishment"). But see *Canepa v. Canada* (M.E.I.) [1992] 93 D.L.R.4th 589 (Fed. C.A.) (Can.) (denying that deportation is punishment under either section 7 or section 12); *Said v. Canada* (M.E.I.) [1992] 91 D.L.R.4th 400, 407-08 (Fed. Ct. T.D.) (Can.) (denying that section 12 applies to deportation of non-Convention refugee claimant to country of origin).

239. See *Waddell v. Canada* (Minister of Justice) [1995] B.C.J. No. 2641 (B.C. Sup. Ct.) (Can.), *aff'd*, Doc. Vancouver CA021408, Apr. 25, 1996 (B.C. C.A.) (Can.), *leave to appeal refused*, [1996] 3 S.C.R. xiv (Can.); see also *R. v. Campbell* [1996] 91 O.A.C. 204, 207-08 (Ont. C.A.) (Can.), *leave to appeal refused*, [1997] 1 S.C.R. vi (Can.) (stating that Minister must be "alive" to section 12 of Charter when making surrender decision).

240. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶¶ 39-75, at 20-30 (1989) (examining potential treatment and punishment of fugitive if extradited to Virginia).

241. [1987] 1 S.C.R. 1045 (striking down seven-year minimum sentence for importing seven and a half ounces of cocaine into Canada).

242. [1991] 3 S.C.R. 485 (Can.) (holding that general test under section 12 is one of gross disproportionality).

12 only where its actual effects on the accused are grossly disproportionate or where they would be so in reasonable hypothetical circumstances.<sup>243</sup> The distinction between "disproportionate" and "grossly disproportionate" treatment or punishment is an important one.<sup>244</sup> Foreign mandatory minimum sentences might be considered disproportionate but not *grossly* disproportionate. In domestic cases, appellate courts are to exercise a deferential standard of review in sentencing. In extradition cases, courts should grant a greater margin of appreciation or deference to foreign legislative sentencing decisions and practices.<sup>245</sup>

#### 4. *Procedural Due Process in the Requesting State*

A court exercising judicial review of a ministerial surrender decision must be satisfied that the fugitive will receive procedural due process in the requesting state.<sup>246</sup> Proportionality in sentencing is not often thought of as an issue related to procedural fairness; indeed, it is viewed as the quintessential example of substantive due process.<sup>247</sup> Nonetheless, a court exercising judicial review of ministerial surrender decisions must examine the procedural framework of the foreign criminal justice system in order to satisfy itself that the fugitive will be treated fairly if extradited. If the fugitive can demonstrate that he or she would not (or did not) receive a fair trial in the requesting state, the court should quash the ministerial surrender order.

Again, there should be no doctrinal barrier to intervention by the courts. The key issue is what constitutes a "fair trial" for this purpose. Requiring Canadian domestic standards will not do. If foreign criminal justice systems had to satisfy the specific procedural requirements of Canadian domestic law, no fugitive could ever be extradited. The *Soering* Court indicated that extradition should be refused when the fugitive would suffer a "flagrant denial of a fair trial."<sup>248</sup> Reference may be made to international human rights law in order to specify what is meant by a "fair trial" in these circumstances.<sup>249</sup> Mere differences between the criminal procedure of the fo-

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243. See *id.* at 505-06; *Zachary v. Canada* (Procureur Général) [1996] R.J.Q. 2484, 2486 (Que. C.A.) (Can.).

244. See *R. v. Lyons* [1987] 2 S.C.R. 309, 344-45 (Can.) (emphasizing that use of word "grossly" in "grossly disproportionate" suggests more exacting standard).

245. See *R. v. McDonnell* [1997] 1 S.C.R. 948, 966 (Can.) (holding that "in the absence of an error of principle, failure to consider a relevant factor, or overemphasis of the appropriate factors, a sentence should only be overturned if the sentence is demonstrably unfit"); *R. v. M.* (C.A.) [1996] 1 S.C.R. 500, 564-65, 567 (Can.) (stating that "courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges").

246. Thus, the majority judges in *Jamieson II*, *Leon*, *Whitley*, and *Ross* evaluated the procedural protections that the fugitive would enjoy under the foreign legal system upon surrender for extradition.

247. See *In re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, 502-03 (Can.) (stating that sections 8 to 14 of Charter embody principles of fundamental justice beyond what could be characterized as "procedural").

248. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 113, at 45 (1989).

249. A similar approach was advocated in *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989), *rev'd*, 910 F.2d 1063 (2d Cir. 1990).

rum and that of the requesting state will not amount to denial of a fair trial. International human rights law, by contrast, establishes a floor below which the criminal justice system of the requesting state may not fall.<sup>250</sup>

A number of international human rights instruments, including the 1990 United Nations Model Treaty on Extradition,<sup>251</sup> address this question. The Model Treaty was explicitly developed and adopted in the hope that it would serve as a model for the future development of national legislation, as well as bilateral and multilateral treaties. Although the Model Treaty has no binding force,<sup>252</sup> domestic courts may use it to inform domestic extradition standards, particularly in the absence of other controlling domestic or international norms. Canadian courts faced with the otherwise daunting task of applying broadly worded constitutional guarantees to specific contexts, such as surrender for extradition, may find such sources particularly helpful.

A Canadian court must be prepared to entertain allegations by a fugitive that he or she would not be accorded a fair trial in the requesting state, or was subjected to an unfair trial if already convicted of the offense, as determined by the following criteria, enunciated in international human rights instruments:

- (a) a fair and public hearing by an independent and impartial court;<sup>253</sup>
- (b) the presumption of innocence;<sup>254</sup>
- (c) the presence of the fugitive before the court (no extradition to face a judgment imposed in absentia);<sup>255</sup>
- (d) nondiscrimination;<sup>256</sup>

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250. This Article does not suggest that domestic courts should apply international human rights norms because they necessarily form part of domestic law. The distinction between domestic and international law is not as rigid as it might appear at first, however. International law norms, either customary or conventional, may prove useful as an interpretative tool when domestic courts are faced with the task of articulating the scope of broadly worded domestic constitutional provisions. For further discussion of this point, see Michell, *supra* note 53, at 386–87, 447. Of course, in some situations there may simply be no applicable international norms, but this does not negate the general proposition that they should be invoked when relevant.

251. U.N. GAOR 3d Comm., 45th Sess., 68th mtg. Agenda Item 100, U.N. Doc. A/Res/45/116 (Dec. 14, 1990), 30 I.L.M. 1407 (1991) [hereinafter Model Treaty].

252. Professor Quigley argues that the ICCPR and the Torture Convention, which the United States ratified in 1994, are self-executing treaties with direct effect under U.S. federal law, with the result that the traditional rule of non-inquiry adopted by U.S. federal courts in extradition cases should be abandoned. See Quigley, *supra* note 142, at 1236–37. The argument made in this Article does not go this far, because it is difficult to argue that the ICCPR and the Torture Convention have direct effect in Canadian domestic law, although there can be little doubt that the drafting of the Charter was informed to a substantial degree by the ICCPR and other international human rights instruments. This Article does argue, however, that the ICCPR and other unincorporated international human rights conventions can play an important interpretative role in assisting domestic courts to articulate the scope of domestic constitutional guarantees. I have developed this argument at greater length elsewhere. See Michell, *supra* note 53, at 445–47.

253. See ICCPR, *supra* note 83, art. 14(1); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810, art. 10 (1948) [hereinafter UDHR]; Model Treaty, *supra* note 251, arts. 3(f), 4(g).

254. See ICCPR, *supra* note 83, art. 14(2); UDHR, *supra* note 253, art. 11.

255. See ICCPR, *supra* note 83, art. 14(3); Model Treaty, *supra* note 251, art. 3(g).

- (e) protection against double jeopardy;<sup>257</sup>
- (f) protection against undue prescription by passage of time or delay;<sup>258</sup>
- (g) no retroactive application of criminal law.<sup>259</sup>

These factors are internationally recognized as essential elements of procedural fairness. When the fugitive can demonstrate that any one of these elements would not be afforded him or her in the requesting state, courts can quash surrender for extradition. In considering these claims, however, it is important that the Canadian judiciary not mistake differences in foreign criminal procedure with the absence of procedural fairness. Where the requesting state is a liberal democracy, the fugitive is likely to face an uphill battle because he will be fighting a strong presumption of procedural adequacy.<sup>260</sup>

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256. See Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, U.N. Doc. E/CONF.82/15, art. 6(6), 28 I.L.M. 493 (1989) (promulgating provision based upon language of European Convention on Extradition); Model Treaty, *supra* note 251, art. 3(b); see also ICCPR, *supra* note 83, arts. 3, 26 (stating equal right of men and women in enjoyment of civil and political rights and that all persons are equal before the law). There may be some overlap between this factor and the political offense exception. In a recent Ontario case, a black fugitive sought to resist extradition to New Jersey on murder charges by claiming that he faced a significantly greater risk of being subjected to capital punishment in that state than would a white defendant. The Ontario Court of Appeal seemed willing to entertain this line of argument but in the end rejected it, noting that since there had been no recent executions in New Jersey, the argument was not susceptible to proof. See *R. v. Campbell* [1996] 91 O.A.C. 204 (Ont. C.A.) (Can.), *leave to appeal refused*, [1997] 1 S.C.R. vi (Can.); see also *Garcia v. Canada* (Minister of Justice) [1997] F.C.J. No. 453 (Fed. Ct. T.D.) (Can.) (rejecting similar claims regarding discrimination against Hispanics in application of death penalty on jurisdictional grounds). Accordingly, Canadian courts may be prepared to entertain similar arguments about racial or other discrimination in punishment in the requesting state, and in appropriate circumstances, this would provide grounds for quashing a surrender order. It seems, however, that a court would intervene only where strong evidence of discrimination was before it.

257. See ICCPR, *supra* note 83, art. 14(7); Model Treaty, *supra* note 251, art. 3(d). This principle has been incorporated into many of Canada's existing extradition treaties. See *Williams*, *supra* note 14, at 397-98.

258. See ICCPR, *supra* note 83, art. 14(3); Model Treaty, *supra* note 251, art. 4(e).

259. See ICCPR, *supra* note 83, art. 15(1); UDHR, *supra* note 253, art. 11.

260. See *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 841, 849-50 (Can.); see also *Canada (M.E.I.) v. Satiacum* [1989] 99 N.R. 171, 176 (Fed. C.A.) (Can.) (noting difficulty of impeaching U.S. judicial process). The more democratic the requesting state, the more difficult it will be for the fugitive to demonstrate fundamental unfairness in extradition to face trial there. When the requesting state is a liberal democracy, its political system may be viewed by the reviewing court as a reasonable proxy for the fairness of trial procedures. By contrast, the less that the foreign state resembles a liberal democracy, the more vigilant the court must be, and the more likely it will be to intervene. A similar argument has been made in the context of the ability of individual fugitives to invoke the doctrine of specialty as a bar to extradition. See Mary-Rose Papandrea, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign*, 62 U. CHI. L. REV. 1187 (1995).

## D. Substantive Elements of Review

### 1. Introduction

In addition to protecting the fugitive's right to procedural due process, courts also must intervene to prevent him or her from being denied substantive due process in the requesting state. As with procedural due process, Canadian courts exercising judicial review of ministerial surrender decisions may refer to international law norms in fleshing out the structure of domestic constitutional rules in the extradition context. In so doing, Canadian courts should adopt a deferential standard of review, recognizing that in only a few cases are international human rights norms clear enough to warrant judicial intervention.

In certain circumstances, international human rights law is either non-existent or too abstract to assist in the interpretation of domestic constitutional norms. This is not surprising; questions of proportionality, sentencing, and the death penalty are as controversial on the international level as they are in the domestic context. Two other sources that may guide courts applying the residual threshold standard to extradition cases are addressed in the following sections. The first is the existing jurisprudence under the Fugitive Offenders Act,<sup>261</sup> the statute that governs rendition from Canada to other Commonwealth states. The second is the treatment accorded to foreign law and foreign tribunals in conflict of laws jurisprudence, which gives rise to similar questions about the proper standard of review for cases involving foreign law and the appropriate weight of decisions of foreign tribunals.

### 2. Proportionality

The extent to which Canadian courts should evaluate the surrender for extradition of fugitives to face foreign sentences on proportionality grounds is the most vexing substantive due process question.<sup>262</sup> International norms in the field are non-existent. Domestic constitutional principles are unhelpful. There must be proportionality between the offender's wrongful conduct and the sentence imposed,<sup>263</sup> but this principle does not take a decisionmaker very far.

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261. R.S.C., ch. F-32 (1985) (Can.).

262. In *Kindler*, the fugitive argued that the death penalty was "arbitrarily and indiscriminately imposed." *Kindler* [1991] 2 S.C.R. at 837-38. Justice La Forest accepted that this would support a Charter challenge under appropriate circumstances but noted that the allegation was not made out on the facts of that case. *See id.* He also referred to the "nature of the offence" as a factor to be weighed in the equation. *See id.* at 835.

263. *See R. v. M. (C.A.)* [1996] 1 S.C.R. 500, 529 (Can.) ("It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender.").

The leading case on the proportionality requirement in the extradition context is *Kindler*.<sup>264</sup> A U.S. citizen was convicted in Pennsylvania of first degree murder, conspiracy to commit murder, and kidnapping. The jury recommended the death penalty. Before sentencing, the fugitive escaped to Canada. He was arrested, and the United States requested his extradition. The extradition judge committed him for extradition, and the Minister of Justice decided that he should be surrendered. The fugitive sought judicial review of the ministerial decision, however, arguing that extradition to face the death penalty for first degree murder violated sections 7 and 12 of the Charter and could not be upheld under section 1. A majority of the Supreme Court of Canada, over a vigorous dissent,<sup>265</sup> found no Charter violation and dismissed the appeal.<sup>266</sup>

The central question in *Kindler* was whether the Minister of Justice's decision under section 25 of the Extradition Act to extradite the fugitive without first seeking assurances from the Pennsylvania authorities that the death penalty would not be imposed or carried out violated the fugitive's Charter rights under sections 7 and 12. Justices La Forest and McLachlin, in separate opinions for the majority, each held that section 12 was inapplicable to extradition proceedings.<sup>267</sup>

At issue, then, was whether the Minister's decision violated section 7. The majority held that it did not. Justice La Forest accepted that the proper interpretation of "fundamental justice" in section 7 would be influenced by section 12. The Court previously had held that extradition must be refused if surrender would place the fugitive in a position that is so "unacceptable" or "outrageous" as to "shock the conscience."<sup>268</sup> But extradition to face the death penalty did not fail this test. The very fact that there had been a recent vote on capital punishment in the House of Commons indicated that the subject was not beyond rational discussion, as a debate over torture would be.<sup>269</sup> Reasonable people could disagree. Justice La Forest held that it would not shock the conscience of Canadians to extradite a fugitive to face the death penalty when he had been accused of horrible crimes ("the worst form of murder").<sup>270</sup> In the other majority opinion in *Kindler*, which commanded the support of two other judges, Justice McLachlin adopted a similar position.<sup>271</sup>

264. [1991] 2 S.C.R. 779. Identical issues were raised in a companion case, *In re Ng Extradition* [1991] 2 S.C.R. 858 (Can.).

265. See *Kindler* [1991] 2 S.C.R. at 789-829.

266. See *id.* at 830-57.

267. See *id.* at 831, 846.

268. *Kindler* [1991] 2 S.C.R. at 831-32 (La Forest, J., concurring) (citing *R. v. Schmidt* [1987] 1 S.C.R. 500 (Can.)).

269. *Cf.* at 851-52 (McLachlin, J., concurring) (stating that legislation granting executive discretion is supported by uncertainty over whether surrender of fugitive to face death penalty may "sufficiently shock" national conscience).

270. *Id.* at 839.

271. Justice McLachlin held that:

At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the of-

In the *Jamieson* cases, in *Ross*, and in *Whitley*, the defendant attacked the length, not the type, of punishment.<sup>272</sup> In each case, the fugitive alleged that the foreign mandatory minimum sentences were disproportionate. Many of the court of appeal judges began their analyses by estimating the sentence that the fugitive would receive if he were convicted of similar offenses in Canada. This estimate was then compared to the punishment to which the fugitive was subject in the United States. Justice Baudouin, dissenting in *Jamieson II*, determined that the penalties imposed upon the fugitive by Michigan law were proportionate to the offenses in question. The length of the sentence was related to the type and quantity of the drug involved. Moreover, in theory, the Michigan law allowed a judge to modify the sentence for "substantial and compelling reasons," even if in practice this rarely took place. Although the foreign mandatory minimum sentences were harsh, they were not arbitrary.

In *Ross*, Justice Taylor adverted to evidence indicating that the fugitive in that case was not facing a disproportionate punishment, given the potential sentence of life imprisonment in Florida for the same offense. Justice Lambert, dissenting in *Ross*, expressed concern that the sentencing judge possessed no discretion to modify the sentence to take into account the circumstances of the offense. The best that the fugitive could hope for upon conviction in Florida on both counts would be two concurrent fifteen-year sentences and the possibility of receiving reductions for good behavior while incarcerated. By comparison, Justice Lambert felt that the fugitive could expect a sentence of about five years' imprisonment for each offense, to be served concurrently, had he been convicted in Canada of the same crimes. This might be reduced to as little as one and three-quarters years of actual imprisonment.<sup>273</sup> The difference between the sentences of each jurisdiction suggested to Justice Lambert (dissenting in *Ross*) that the Florida sentence was disproportionate to the offense, so that extradition would violate section 7.

Clearly, there was wide variation in the estimates made by the judges as to how long the respective fugitives would serve if convicted abroad. Not surprisingly, the variation in the estimates affected the result in each case. In *Ross*, the disparity between the foreign sentences and those that would apply to the same offense in Canada (which Justice Taylor held to be the difference

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fence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations.

*Kindler* [1991] 2 S.C.R. at 850. Amanda Spencer notes that "no reference was made to the . . . rights of the [fugitive]" in this enumeration of factors. See Spencer, *supra* note 14, at 66.

272. In a number of similar cases, mandatory minimum sentences were to be imposed for offenses involving very large quantities of drugs, so the proportionality issue was not as stark. See *Bouthillier v. Downs* (Juge) [1993] 51 Q.A.C. 31 (Que. C.A.) (Can.); *Chouinard v. Downs* (Juge) [1993] 51 Q.A.C. 26 (Que. C.A.) (Can.); *Doyer v. Downs* (Juge) [1993] 51 Q.A.C. 1 (Que. C.A.) (Can.), *rev'd on other grounds sub nom. United States v. Doyer* [1993] 4 S.C.R. 497 (Can.).

273. See *United States v. Ross* [1994] 119 D.L.R.4th 333, 348 (B.C. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 469 (Can.).

between two years in Canada and slightly over six years in Florida) was such that the fugitive did not face a situation that was "simply unacceptable." Justice Taylor distinguished the *Jamieson* cases in *Ross*, noting that there the fugitive faced a minimum sentence of twenty years, which would have to be served in full. Unlike *Ross*, there was no possibility in *Jamieson* that the mandatory minimum sentence could be reduced on the basis of good behavior or other factors. In *Ross*, by contrast, Justice Taylor assumed that the fugitive would face a fifteen-year sentence subject to reduction to just over six years for good behavior in prison, with the possibility of transfer to Canada.<sup>274</sup> Thus, comparisons were made even as between the four cases under discussion.

These contrasting approaches highlight the often speculative nature of the enterprise of engaging in a prospective determination of the sentence that a fugitive would face if convicted abroad. Foreign sentencing regimes are legal regimes, so that estimating a potential sentence in the requesting state invariably requires the domestic court to examine questions of foreign law. It may be unclear what punishment the requesting state will impose. Even if the type of sentence is certain, debate will rage over the likelihood that a particular sentence will be imposed in the requesting state. Foreign sentencing regimes are likely to be just as complicated as domestic ones. Of course, the main objection to the foreign mandatory minimum sentencing regimes at issue in the cases under discussion is that they were not sufficiently complicated, at least by Canadian domestic standards. Rather, the concern was that they are too simple, in that they ignored relevant factors in the sentencing process.

Two distinct senses of proportionality were at work in these cases. The first is a comparative or ordinal conception of proportionality; the judges who believed that surrender for extradition was unconstitutional considered the U.S. mandatory minimum sentences to be disproportionate because they were longer—perhaps much longer—than their Canadian counterparts. The comparative or ordinal conception of proportionality is premised on the assumption that there is a universal metric of proportionality. On this theory, the same offense should receive the same sentence no matter where it is committed. Not surprisingly, Canadian sentencing practices are considered the standard against which foreign sentences are to be measured. Foreign mandatory minimum sentences, it seems, may offend this concept of proportionality simply because they are longer than their Canadian counterparts.

Justice Proulx, dissenting in *Jamieson I*, considered the "objective gravity" of the offense and the personal characteristics of the offender to be

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274. See *id.* at 334–35; see also Transfer of Offenders Act, R.S.C., ch. T-15 (1985) (Can.). Note, however, that a Charter challenge to such legislation also could be made, particularly if it was alleged that Canada was enforcing a foreign prison sentence that might raise constitutional issues under Canadian law. Transfer of offenders treaties have proven controversial in the United States. See JORDAN J. PAUST, *The Unconstitutional Detention of Prisoners by the United States Under the Exchange of Prisoner Treaties*, in INTERNATIONAL LAW AS LAW OF THE UNITED STATES 421, 424–29 (1996).



the proper measure of the proportionality of the foreign sentence.<sup>275</sup> Dissenting in *Ross*, Justice Lambert relied upon the domestic constitutional conception of proportionality in arguing that the sentence that would be imposed in Canada should be used as a yardstick by which to measure the proportionality of the foreign punishment. On this basis, he maintained that the sentence that the fugitive faced in Florida was "markedly disproportionate."<sup>276</sup> Essentially, adoption of the comparative or ordinal conception of proportionality leads to the application of domestic constitutional norms directly to the foreign sentence, so that if the foreign sentencing regime is found to violate the Charter, extradition is refused.

Similarly, some commentators have proposed that requested states should refuse to surrender a fugitive to face a foreign sentence that would be more severe than that which would be imposed under the law of the requested state.<sup>277</sup> Under this approach, extradition would be permitted only on the assurance of the requesting state that the fugitive, if convicted, would not be subjected to a sentence more severe than the maximum sentence that could be imposed under the law of the requested state. Yet nothing in the prior cases suggests that the mere fact that punishment abroad would be more severe than in Canada renders extradition contrary to the Charter. The comparative conception of proportionality provides no useful guideposts to courts in extradition cases, and indeed, it collapses into a domestic threshold standard of review.<sup>278</sup>

The second sense of proportionality is a more process-oriented one. It examines the elements of proportionality in Canadian sentencing law (such as the age of the offender, the seriousness of the offense, and the moral blameworthiness of the offender),<sup>279</sup> in addition to other factors such as deterrence requirements and the seriousness of the crime problem in the juris-

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275. See *Jamieson I* [1992] 73 C.C.C.3d 460, 475 (Que. C.A.) (Can.).

276. *Ross* [1994] 119 D.L.R.4th at 349 (Lambert, J., dissenting).

277. See, e.g., Van den Wyngaert, *supra* note 96, at 768-69.

278. In *Zimmerman v. Canada (Minister of Justice)* [1995] 66 B.C.A.C. 143, 146 (B.C. C.A.) (Can.), Justice Southin suggested that a foreign sentence would be unlikely ever to violate any "principle of fundamental justice," observing that "every country creates its own scale, so to speak, of terms of imprisonment according to its own opinion of what is a serious or not-so-serious crime. A country changes its scale in accordance with changing perceptions of the damage which any particular crime does to the community." This seems to go too far, but it does suggest that the comparative conception of proportionality is of limited utility.

279. See *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779, 835 (Can.); see also *Soring v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 108, at 43 (1989). For a discussion of age, see *R. v. M. (C.A.)* [1996] 1 S.C.R. 500, 552-53 (Can.) (holding that sentence must take into account age and generally should not "surpass any reasonable estimation of the offender's remaining natural life span"). Both Justices La Forest and McLachlin indicated in *Kindler* that the personal circumstances of the fugitive must be considered in determining whether a foreign treatment or punishment was excessive or disproportionate, and in *Whitley, Ross, Jamieson*, the majority adopted this approach. See *United States v. Whitley* [1994] 119 D.L.R.4th 693, 712-713 (Ont. C.A.) (Can.) (noting fugitive's extensive criminal record in determining proportionality of punishment to crime), *aff'd*, [1996] 1 S.C.R. 467 (Can.); *Ross* [1994] 119 D.L.R.4th at 346-49 (examining circumstances of offender in determining proportionality of punishment to wrongful conduct); *Jamieson I* [1992] 73 C.C.C.3d at 465-69 (examining proportionality of 20-year minimum sentence for drug offense).

diction,<sup>280</sup> and it determines whether those elements would be (or have been) properly addressed by the foreign sentencing regime for the particular fugitive. This second sense of proportionality assumes that there is no single sentence that is uniquely appropriate. Rather, it focuses on whether the process of determining the proper sentence addressed the relevant factors. It is the *mandatory* nature of mandatory minimum sentences—the danger that the foreign sentences will be imposed mechanistically without regard to the factors that animate Canadian sentencing decisions—that is more likely to offend this second conception of proportionality. As long as a foreign sentencing decision appears to have taken into account the same sort of considerations that would enter a Canadian sentencing decision, it will be unobjectionable even if the sentence imposed is considerably different from that which would be imposed by a Canadian court.

In *Waddell v. Canada*,<sup>281</sup> therefore, Justice Tysoe compared the sentences that the fugitive was likely to face in Arizona with Canadian sentences for comparable offenses. Although the Arizona penalties were slightly higher, Justice Tysoe found them not to be “significantly different” from their Canadian counterparts.<sup>282</sup> He also noted that the Arizona sentences were not “grossly disproportionate having regard to the offence and the offender.”<sup>283</sup> This approach reflects Justice Lamer’s view in *Smith* that “[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation . . . .”<sup>284</sup>

Although the comparative and process-oriented conceptions of proportionality are related, they are not identical. The second conception’s requirements can be met without necessarily fulfilling those of the first. A Canadian court might well find that a foreign court would consider the relevant factors in making a sentencing decision and find that it satisfied the proportionality requirements of Canadian constitutional law without necessarily agreeing with the length of the foreign sentence. For example, the difference

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280. This factor breaks down into two separate elements. First, circumstances may be different in the requesting state, and the foreign sentencing regime simply may be a response to those unique circumstances. Even the Canadian Parliament might adopt a similar sentencing regime to that operating in the requesting state were the circumstances of the foreign state present in Canada. Second, foreign legislatures and courts must be given some leeway to decide what the appropriate punishments for serious criminal offenses should be because their expertise and knowledge of local conditions is likely to be far superior to that of a Canadian court. As a result, there can be legitimate differences of opinion as to what is appropriate or proportionate. The margin of appreciation doctrine and related conceptions of federalism and subsidiarity support a deferential standard of review. Sentences may and should vary by region and country. *Cf. M.* [1996] 1 S.C.R. at 567 (“As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the ‘just and appropriate’ mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.”).

281. [1995] B.C.J. No. 2641 (B.C. S.C.) (Can.), *aff’d*, Doc. Vancouver CA021408, Apr. 25, 1996 (B.C. C.A.) (Can.), *reprinted in* 33 W.C.B.2d 20, 22 (1996) (Can.), *leave to appeal refused*, [1996] 3 S.C.R. xiv (Can.).

282. *Id.* ¶ 33.

283. *Id.* ¶ 30.

284. *R. v. Smith* [1987] 1 S.C.R. 1045, 1072 (Can.).

in sentence might well be attributable to the different conditions in the foreign state. Each conception of proportionality has a role to play. The comparative conception allows some absolute boundaries to be set, whereas the process-oriented conception allows domestic courts to give some measure of deference—a margin of appreciation—to foreign courts.

Accordingly, Canadian courts exercising constitutional judicial review of ministerial surrender decisions in extradition cases in which the fugitive faces lengthy imprisonment in the requesting state should concern themselves with the process-oriented conception of proportionality rather than the comparative approach. In this way, Canadian courts can retain a residual form of judicial review while at the same time deferring to the legitimate sentencing decisions of foreign courts and legislatures. Yet the possibility should remain that extradition could, in rare cases, be considered unconstitutional simply because the length of the sentence alone would be “so excessive as to outrage standards of decency.”<sup>285</sup>

Professor Schabas and others have criticized the Supreme Court’s decisions in *Kindler* and *Ng* for not setting out an objective test for determining the threshold of severity. They lament the court’s reliance on subjective accounts of public opinion and contend that it was inappropriate for the court to take judicial notice of certain supporting facts (for example, a recent Parliamentary vote on capital punishment). They prefer that the Court directly rely upon international human rights norms to establish such “objective” criteria.<sup>286</sup>

This is fine so far as it goes—there are international human rights norms on torture, prison conditions, and slavery, for example.<sup>287</sup> Where an extradited fugitive would face such treatment in violation of international human rights standards, a Canadian court should quash a surrender order on the grounds that it would “shock the conscience” to do otherwise. Note, however, that there must be near-universal agreement at the international level in order for this approach to function, because otherwise it will prove

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285. *Id.* (citation omitted); see also H.C. Debates, 34th Parl., 3d Sess., Nov. 7, 1991, at 4781 (statement of Mr. George S. Rideout) (“We must have some concerns with countries where penalties associated with the crimes are so serious that we wonder whether there is in fact justice in those countries.”). Even the majority judges in *Whitley*, *Ross*, and *Jamieson I* conceded that at some point “excessive” severity in sentencing would violate the principle of proportionality and “shock the conscience,” violating section 7 in a manner that could not be upheld under section 1 of the Charter. See *United States v. Whitley* [1994] 119 D.L.R.4th 693, 712–13 (Ont. C.A.) (Can.), *aff’d*, [1996] 1 S.C.R. 467 (Can.); *United States v. Ross* [1994] 119 D.L.R.4th 333, 343–49 (B.C. C.A.) (Can.), *aff’d*, [1996] 1 S.C.R. 469 (Can.); *Jamieson I* [1992] 73 C.C.C.3d 460, 465–69 (Que. C.A.) (Can.).

286. See, e.g., William A. Schabas, *Kindler and Ng: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion*, 51 REV. DU BARR. 673, 686–91 (1991) (suggesting that *Kindler* and *Ng* appeal to international bodies).

287. See, e.g., Torture Convention, *supra* note 217, art. 3 (stating that no state shall extradite where there are “substantial grounds” to believe that the fugitive would be in danger of being subjected to torture in the requesting state); ICCPR, *supra* note 83, art. 7; UDHR, *supra* note 253, art. 5 (stating that no one shall be subjected to torture or inhuman punishment). Some states have incorporated such norms into their domestic extradition legislation. See, e.g., Extradition Act, 1988, § 22(3)(b) (Austl.) (forbidding extradition unless Attorney General is assured that there is no risk of torture).

impossible to identify any pertinent international human rights norms. Extradition to face torture is unthinkable, but this demonstrates only that torture is an easy case.

In the absence of near-unanimity of world public opinion as reflected in international human rights law, the appeal to so-called "objective factors" is largely illusory. Relying upon international human rights norms sounds attractive, and it is useful for a court in determining whether Canada's state responsibility would be implicated by a particular surrender decision. But those who suggest that human rights norms should play a greater role in the extradition process must indicate how relevant norms should be identified and applied outside of clear cases such as those involving torture.<sup>288</sup> The reality, at present, is that there are few such norms. An examination of surrender for extradition to face the death penalty illustrates the problem.

### 3. *The Death Penalty*

Canadian courts should look to international human rights standards to inform their interpretation of section 7 of the Charter. It must be acknowledged, however, that in some fields there simply are no recognized international standards. Thus, there is little merit to the argument that an approach to constitutional interpretation that relies, in part, on international human rights norms to inform the meaning of Charter provisions means that extradition to face capital punishment would "shock the conscience." This is precisely because the international legal status of capital punishment is highly equivocal.<sup>289</sup> For example, the imposition of the death penalty for murder

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288. For example, Shea argues in favor of injecting international human rights norms into the extradition process, but concedes that "[i]f *Soering*-style jurisprudence is to become a model for national courts in extradition cases, more specific criteria for judging the judicial and penal systems of foreign countries are needed." Shea, *supra* note 118, at 128 n.247 (citation omitted); see also M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 645 (3d ed. 1996) ("The prohibition against cruel and unusual punishment can be said to constitute a general principle of international law because it is so regarded by the legal systems of civilized nations. But that alone does not give it a sufficiently defined content bearing on identifiable applications capable of more than general recognition.").

289. There is no consensus against the death penalty per se in international human rights law, although there are signs indicating that such a consensus may one day emerge. See, e.g., Sharon A. Williams, *Extradition to a State That Imposes the Death Penalty*, 28 CAN. Y.B. INT'L L. 117, 150-51 (1990) (discussing death penalty as potential violation of prohibitions against cruel and unusual punishment in international law). Even Professor Schabas conceded, in commenting on *Kindler* and *Ng*, that at most there is "a growing trend in human rights law toward abolition of the death penalty." William A. Schabas, *Canada—Extradition—Death Penalty—International Human Rights Treaties*, 87 AM. J. INT'L L. 128, 130 (1993). If and when such a consensus evolves, Canadian law can evolve with it. On the status of the death penalty in international human rights law, see generally WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2d ed. 1997); and WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS* (1996).

does not violate international law.<sup>290</sup> A residual threshold standard of review would counsel that in the absence of clear international norms on capital punishment, surrender for extradition to face capital punishment may, but will not always, implicate the Charter. Extradition to face particular forms of the death penalty, or its imposition for particular offenses, might do so, however.

This can be seen from recent determinations of the United Nations Human Rights Committee. Following the rejection of their claims by the Supreme Court of Canada, the fugitives in both *Kindler* and *Ng* brought applications before the Committee under the ICCPR and its Optional Protocol challenging the legality of the surrender decisions. In *Kindler v. Canada*,<sup>291</sup> the Committee held that extradition to the United States to face the risk of the death penalty by lethal injection and the death row phenomenon did not violate the ICCPR. The fugitive had argued that the death penalty was per se cruel and inhuman treatment or punishment; therefore, extradition implicated article 7 of the ICCPR, and Canada was obliged to seek assurances under the Canada-U.S. Extradition Treaty that the death penalty would not be imposed.<sup>292</sup> The issue before the Committee was whether Canada exposed the fugitive to a real risk of the violation of his rights under the ICCPR by surrendering him for extradition to the United States. State responsibility would attach to Canada if the fugitive had been exposed to such a risk. The Committee held that the imposition of the death penalty by lethal injection for murder did not in itself amount to a violation of the ICCPR, however. The Committee distinguished *Soering v. United Kingdom*<sup>293</sup> on the ground that an extradition request had been made in that case by a country besides the United States—Germany—and that, unlike *Kindler*, there were mitigating factors present, namely the youth and mental irregularity of the fugitive.<sup>294</sup> Accordingly, the Committee found no violation of the ICCPR or its Optional Protocol.<sup>295</sup> A subsequent decision concerning another fugitive reached the same conclusion.<sup>296</sup>

The Committee's views in *Kindler* left open the possibility that particular forms of the death penalty could violate the ICCPR. Soon after, in *Ng v. Canada*,<sup>297</sup> the Committee expressed the view that extradition to Califor-

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290. In *Kindler*, the dissenting Justice Cory suggested only that there was an international trend towards the abolition of capital punishment. See *Kindler v. Canada* (Minister of Justice), 2 S.C.R. 779, 807. This point was emphasized by the majority. See *id.* at 833-34 (La Forest, J., concurring).

291. Decision of July 30, 1993, Concerning Comm. No. 470/1991, reprinted in 14 HUM. RTS. L.J. 307 (1993).

292. See *id.* ¶ 3, at 308.

293. 161 Eur. Ct. H.R. (ser. A) (1989).

294. See *Kindler* ¶ 15.3, reprinted in 14 HUM. RTS. L.J. 307, 314 (1993).

295. See *id.* ¶ 16, reprinted in 14 HUM. RTS. L.J. 307, 314 (1993).

296. See *Cox v. Canada*, Decision of Oct. 31, 1994, Concerning Comm. No. 539/1993, reprinted in 15 HUM. RTS. L.J. 410 (1994) (holding that extraditing U.S. citizen to face possible imposition of death penalty in Pennsylvania does not violate ICCPR).

297. *Ng v. Canada*, Decision of Nov. 5, 1993, Concerning Comm. No. 469/1991, reprinted in 15 HUM. RTS. L.J. 149 (1994).

nia to face death by cyanide gas asphyxiation would violate article 7 of the ICCPR. Reiterating its earlier views in *Kindler*, the Committee held that extradition to face the death penalty did not necessarily implicate Canada in a violation of the ICCPR, but that under the circumstances, the method of execution would amount to "cruel and inhuman treatment" in violation of article 7 of the ICCPR.<sup>298</sup> Thus, it was not the death penalty itself, but the particular method of execution, that placed Canada in violation of the ICCPR. While the Committee disagreed with the Supreme Court of Canada as to whether a particular method of execution amounted to "cruel and inhuman treatment," it did *not* hold that extradition to face the death penalty constitutes a per se violation of international human rights norms.<sup>299</sup>

Professor Schabas neglects the central issue at stake in the Supreme Court's decisions in *Kindler* and *Ng*: proportionality.<sup>300</sup> The cases were not about the death penalty per se (although dissenting judges and academic commentators have focused largely upon this issue), but rather the question of the constitutionality under section 7 of extraditing a fugitive to face a particular form of the death penalty *for first degree murder*.<sup>301</sup> Justices La Forest and McLachlin in *Kindler* never suggested that the death penalty was an appropriate punishment in *all* circumstances, only that it did not "shock the conscience" in the particular cases; in their view, the death penalty was a proportionate response to the situations in question. Indeed, both Justices indicated that extradition to face the death penalty might well violate section 7 if certain (unspecified) conditions were met.<sup>302</sup> But the constitutional status of the death penalty in Canada and the Canadian Government's views expressed in international fora on the death penalty in domestic law are simply irrelevant.<sup>303</sup>

Similarly, it is difficult to agree with James O'Reilly's suggestion that the majority judges in *Kindler* and *Ng* were wrong to consider the gravity of the offense as a factor in section 7 review because the death penalty is imposed in the United States only for the most serious crimes, so that any con-

298. See *id.* ¶¶ 16.1–18, reprinted in 15 HUM. RTS. L.J. 149, 157 (1994).

299. See *id.* ¶¶ 16.1–16.2, reprinted in 15 HUM. RTS. L.J. 149, 157 (1994).

300. Pak, *supra* note 212, and Manson, *supra* note 232, likewise neglect the issue of proportionality.

301. See *United States v. Garcia* [1994] O.J. No. 1027, ¶¶ 34, 52–53 (Ont. Gen. Div.) (Can.), *appeal dismissed*, [1996] 31 W.C.B.2d 458 (Ont. C.A.) (Can.), *leave to appeal refused*, [1997] 34 W.C.B.2d v (Can.).

302. See *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 835–36 (Can.) (La Forest, J., concurring); *id.* at 852 (McLachlin, J., concurring).

303. The Supreme Court's decision in *Kindler* suggests in dicta that the death penalty might well be unconstitutional under section 7 of the Charter. See *Kindler* [1991] 2 S.C.R. at 833 (La Forest, J., concurring). This does not of itself affect the position under discussion here, however. Canada's opposition to the death penalty at the international level presents a more interesting question, although it does not have as much force as Professor Schabas has argued. See *R. v. Hanson* [1994] O.J. No. 102 (Ont. C.A.) (Can.) (holding that letter by Canadian ambassador, indicating Canada's opposition to imposition of death penalty as punishment by International Criminal Tribunal for the Former Yugoslavia, does not render extradition to face death penalty for murder unconstitutional).

sideration of this factor by the Canadian court on judicial review would be "superfluous."<sup>304</sup> In these cases, the state legislation that imposed the death penalty required the trier of fact to take into account a number of factors, an exercise that only reinforces the majority's view that the death penalty was proportionate to the offense. If the law of the requesting state were to impose the death penalty for lesser offenses, or without taking circumstances into account, or in the absence of appropriate procedural protections, or where the death penalty was imposed in a particularly cruel manner, then extradition would, in all likelihood, be refused because it would be so seriously disproportionate as to violate sections 7 and 12. By analogy, the same holds true for extradition in non-capital cases.

The example of extradition to face the death penalty demonstrates that using international human rights standards as a benchmark for deciding when to quash a ministerial surrender decision sets a relatively high threshold. This is as it should be. The essence of the residual threshold standard is that it attempts to balance the rights of fugitives against the public interest in having an effective extradition system. As part of this equation, domestic courts must afford a margin of appreciation to decisions of the executive and the operation of foreign criminal justice systems. It necessarily follows that fugitives will be extradited to face foreign procedures or punishments that might not meet Canadian constitutional standards. Yet at a certain point, Canadian courts must intervene, and that point should be defined, in part, by reference to international human rights standards. Where such standards exist, they may be invoked by courts as the appropriate minimum standards that the requesting state must observe. By contrast, where no such standards exist, domestic courts should be highly circumspect about intervening.

#### 4. *The Fugitive Offenders Act*

Given disagreement over appropriate punishments for crime, both within Canada and in the international community, it is unsurprising that except in clear cases such as those involving torture, international human rights instruments provide no useful "objective criteria" for determining whether a foreign sentence is proportionate. Certainly, they yield nothing more specific than do domestic norms.<sup>305</sup> In the absence of sufficiently certain and detailed international human rights norms, reference to other sources of domestic law may prove helpful in establishing proper guidelines for review of surrender decisions for fugitives facing severe mandatory minimum sentences abroad.

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304. O'Reilly, *supra* note 202, at 883.

305. See Sheleff, *supra* note 19, at 337 (suggesting that international human rights norms might be used to place some limits upon disproportionate foreign prison sentences but not indicating how this would occur); Williams, *supra* note 14, at 409-10 (observing that decisions of European Commission of Human Rights indicate that international human rights law provides no guidelines that would bar extradition to face lengthy foreign prison sentences).

One such source of domestic law is the existing jurisprudence under the Fugitive Offenders Act. In general, the Act's rendition system is premised on the idea that Commonwealth states possess a common legal, political, and cultural heritage.<sup>306</sup> The implication is that they may trust each other to do justice to fugitives. Whether this assumption remains valid is debatable, given the diversity of states within the Commonwealth, the doubtful human rights standards of some of them, and the advent of the requirements of section 7 of the Charter.<sup>307</sup> In any event, the existence of a distinct apparatus for returning fugitives to requesting Commonwealth states illustrates that the procedural protections for a fugitive who faces removal from Canada are inversely related to the trust afforded to the criminal justice system of the requesting state.

On the theory that the Extradition Act should (and generally does) provide greater procedural protections to fugitives than does the Fugitive Offenders Act, Charter review of a ministerial surrender decision under the Extradition Act could be informed by reference to the procedural protections accorded to fugitives under the Fugitive Offenders Act. Section 16 of the Fugitive Offenders Act provides that a Canadian court may decline to surrender a fugitive for rendition:

Whenever it appears to the court that by reason of the trivial nature of the case or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice, or that, for any other reason, it would, having regard to the distance, to the facilities for communication and to all the circumstances of the case, *be unjust or oppressive or too severe a punishment* to return the fugitive either at all or until the expiration of a certain period, the court may

- (a) discharge the fugitive, either absolutely or on bail;
- (b) order that he shall not be returned until after the expiration of the period named in the order; or
- (c) make such other order in the premises as to the court seems just.<sup>308</sup>

There is no equivalent to section 16 in the Extradition Act. Although at first it may seem anachronistic, this provision may be helpful in interpreting

306. See *Argentina v. Mellino* [1987] 1 S.C.R. 536, 552 (Can.) ("Commonwealth countries are heirs to the British criminal justice system."); *R. v. Harrison* [1918] 29 C.C.C. 420, 422 (B.C. S.C.) (Can.) (stating that "some additional care ought to be taken in the case of extraditing persons to foreign [i.e., non-Commonwealth] countries more than in facilitating criminal proceedings in the various parts of the Empire to which alone the Fugitive Offenders Act applies").

307. See *LA FOREST*, *supra* note 3, at 237, 241-42; see also *Chan c. Directrice de la Maison Tanguay* [1996] R.J.Q. 335 (Que. Super. Ct.) (Can.) (allowing rendition to Hong Kong despite defendant's claim that standards of treatment would not meet Canadian constitutional norms), *aff'd*, [1996] 113 C.C.C.3d 270 (Que. C.A.) (Can.), *leave to appeal refused*, [1997] 114 C.C.C.3d vi (Can.); *Commonwealth of Australia v. Cousins* [1992] O.J. No. 598 (Ont. Prov. Div.) (Can.) (noting that Fugitive Offenders Act is "an anachronism, which now applies colonial law to an independent Canada").

308. Fugitive Offenders Act, R.S.C., ch. F-32, § 16 (1985) (emphasis added). A fugitive may invoke section 16 of the Fugitive Offenders Act before a surrender decision has been made. See *Chan* [1996] 113 C.C.C.3d at 289.



the scope of protection for fugitives facing extradition under the Extradition Act. Specifically, it should be understood as a floor. Certainly, the Supreme Court's interpretation of section 7 of the Charter in the extradition context has been used by courts in their interpretation of section 16 of the Fugitive Offenders Act.<sup>309</sup> This would be particularly helpful when the fugitive faces a mandatory minimum sentence abroad, because the Fugitive Offenders Act specifically identifies excessive severity of the foreign punishment as a ground for discharging the fugitive or pursuing other alternatives, such as imposing conditions upon surrender.<sup>310</sup> Professor Anne La Forest notes that section 16 of the Fugitive Offenders Act appears to provide stronger protection for fugitives' rights than the Charter does under the Extradition Act. She explains this discrepancy by noting that extradition is based upon international treaty commitments, whereas rendition is not.<sup>311</sup> Whatever the explanation, it would be both surprising and incongruous if the relatively informal procedures of rendition provided stronger protection to fugitives than extradition legislation.

Accordingly, judicial review of ministerial surrender decisions under the Extradition Act should be structured at least in part by reference to the protections granted a fugitive under the Fugitive Offenders Act. Although this standard would not require that the sentence imposed by the foreign state for a particular offense be exactly the same as that likely to be handed down by a Canadian court for the same crime, a high degree of disproportionality could violate section 7. The nub of the issue is to define this attenuated proportionality.

### 5. *Conflict of Laws Jurisprudence*

The proper role of courts under the residual standard of inquiry in extradition cases may be illuminated by comparison to the function of courts in conflict of laws cases. In civil cases, courts often must engage in what amounts to an evaluation of the integrity of foreign judicial systems in deciding whether to recognize or enforce foreign judgments. For example, domestic courts will decline to enforce a foreign judgment where it is shown to

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309. See *Chan* [1996] R.J.Q. at 348-49. But see *Mellino* [1987] 1 S.C.R. at 552 (distinguishing cases interpreting what is now section 16 of Fugitive Offenders Act, on theory that Parliament can impose higher evidentiary demands on requesting state in absence of treaty).

310. No court has yet declined to surrender a fugitive for rendition on the grounds of severity of the foreign sentence pursuant to section 16 of the Fugitive Offenders Act or analogous provisions in its British predecessors. But the power of the courts under section 16 and its analogues is very broad. See *Chan* [1996] 113 C.C.C.3d at 286; *In re Fai & R.* [1979] 48 C.C.C.2d 173, 175 (Que. Super. Ct.) (Can.); see also *Great Britain v. Taylor* (No. 2) [1990] O.J. No. 2015 (Ont. Gen. Div.) (Can.) (noting that presiding judge possesses wide discretion to review committal decision), *aff'd*, Doc. CA 1046/90, Mar. 18, 1991 (Ont. C.A.) (Can.); *R. v. Delisle* [1896] 5 C.C.C. 210, 222, 223-224 (Que. Q.B., Crim. Side) (Can.) (discussing extent of court's powers).

311. See LA FOREST, *supra* note 3, at 251-52.

have been rendered through fraud<sup>312</sup> or in a manner contrary to natural justice,<sup>313</sup> or where enforcement of the foreign judgment would be contrary to Canadian public policy.<sup>314</sup> In such decisions, the concept of public policy plays an increasingly important role. The conflict of laws jurisprudence indicates how a residual threshold standard operates. In general, deference is given to the operation of foreign law and tribunals: The mere fact that the foreign law is different does not render it inapplicable. It is only where the effects of foreign law would violate Canadian public policy, which is conceptualized relatively narrowly, that Canadian courts will decline to give it effect.

Thus, when a party seeks to have a foreign judgment recognized or enforced in Canada, a question arises as to whether Canadian public policy would be violated as a result. In *Boardwalk Regency Corp. v. Maalouf*,<sup>315</sup> the respondent had traveled to Atlantic City, incurred gaming debts, and returned home to Ontario without paying them. The casino operator obtained a default judgment against the respondent in New Jersey and sought to enforce it in Ontario. The respondent resisted enforcement on the ground that such a foreign judgment would offend public policy in Ontario.<sup>316</sup>

The Ontario Court of Appeal allowed the foreign judgment to be enforced, even though the debt would be unenforceable (and illegal) under the Gaming Act<sup>317</sup> had the debt arisen in Ontario. Justice Carthy did not doubt that courts could decline to recognize or enforce a foreign judgment on public policy grounds. In his view, however, the scope of public policy was relatively narrow: It did not extend to *all* of the statutory provisions or common law rules of the forum. The mere fact that a foreign judgment was rendered under legislation or a cause of action that is unknown in the forum (or indeed, even technically unlawful under it) does not of itself preclude its recognition or enforcement in Canada.<sup>318</sup> Rather, the public policy defense should encompass only the "essential morality" of the forum, which "must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consistent with our system of justice and general moral outlook to countenance the conduct."<sup>319</sup> Gambling, though il-

312. See, e.g., *Jacobs v. Beaver* [1908] 17 O.L.R. 496 (Ont. C.A.) (Can.) (setting forth scope of fraud defense).

313. See *United States v. Ivey* [1995] 26 O.R.3d 533, 553 (Ont. Gen. Div.) (Can.), *aff'd*, [1996] 30 O.R.3d 370 (Ont. C.A.) (Can.), *leave to appeal refused*, [1997] 33 O.R.3d xv (Can.); cf. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995) (upholding due process objection to enforcement of foreign judgment).

314. See *Ivey* [1995] 26 O.R.3d at 553-54 (outlining scope of public policy defense to recognition and enforcement of foreign judgment).

315. *Boardwalk Regency Corp. v. Maalouf* [1992] 6 O.R.3d 737, 741-46, 748-51 (Ont. C.A.) (Can.) (describing public policy issue).

316. The doctrine of *ordre public* fulfills the same function in Québec law. See ETHEL GROFFIER, *PRÉCIS DE DROIT INTERNATIONAL PRIVÉ QUÉBÉCOIS* ¶ 326 (2d ed. 1982).

317. See Gaming Act, R.S.O., ch. 183, §§ 1, 4-5 (1980) (Ont.) (Can.).

318. See *Boardwalk Regency* [1992] 6 O.R.3d at 742.

319. *Id.* at 743.

legal in Ontario at the time, was not "tainted by immorality" in this way, so public policy afforded no defense to enforcement of the judgment.<sup>320</sup> Justice Lacourcière, in a concurring opinion, stated that "the contemporary Canadian standard of morality would prefer that personal responsibility be attached to Canadians who engage in licensed gaming activities abroad and that those citizens not be sheltered from enforcement proceedings where debts result."<sup>321</sup> It is not a stretch of logic to apply these same words to judicial review of ministerial surrender decisions in extradition cases.

Accordingly, Canadian courts will recognize and enforce foreign judgments even where they may seem incompatible with domestic legislation, as long as it would not offend "essential morality" to do so. Such an approach serves several goals. It is generally deferential to foreign courts, thus fulfilling the requirements of comity; ensures reciprocal and effective recognition and enforcement of foreign judgments; addresses voluntary submission and safe haven concerns; and also retains a residual ability to deny effect to foreign judgments where the Canadian forum's essential public policy concerns would be affected. The analogy with the extradition context should be clear. In both contexts, the concern is with giving effect to the decisions of foreign courts while at the same time protecting individual rights.<sup>322</sup>

Admittedly, where the issue is whether to recognize a foreign judgment that already has been rendered, the task of the Canadian court is simplified in that it is engaging in a retrospective analysis of a case, rather than guessing at the outcome. By contrast, a court reviewing the executive decision to surrender a fugitive for extradition must engage in a prospective evaluation of the quality of the foreign criminal justice system. Nonetheless, there are parallels between these types of analysis.

Moreover, at times civil courts must judge the fairness of foreign legal systems, such as when determining whether to stay proceedings on the basis of the doctrine of *forum non conveniens* and requiring a plaintiff to bring her claim in a foreign forum. In such cases, courts adopt the general presumption that justice will be done in the foreign state, a presumption that may be rebutted by cogent evidence.<sup>323</sup> Such decisions are admittedly somewhat im-

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320. *See id.* at 745.

321. *Id.* at 750-51 (Lacourcière, J., concurring).

322. A similar analogy may be drawn with the approach adopted by courts in giving effect to letters rogatory (letters of request) for judicial assistance from foreign courts. So long as the procedural and substantive requirements are met, a foreign request is to be given full force and effect unless it can be shown to be contrary to the public policy of the forum "or otherwise prejudicial to the sovereignty of the citizens of that jurisdiction." *Zingre v. R.* [1981] 2 S.C.R. 393, 401 (Can.). Courts take a broader approach to the doctrines of public policy and sovereignty with respect to letters rogatory, largely because they are being requested to exercise their coercive powers against persons resident in the jurisdiction, which involves a much more obvious exercise of extraterritorial power by the requesting state than in cases involving foreign judgment. It should be noted that in Canada, letters rogatory are not generally given effect by treaty, another distinction from the extradition context.

323. *See, e.g., Amchem Prods., Inc. v. British Columbia (Workers' Compensation Bd.)* [1993] 1 S.C.R. 897, 917 (Can.) (holding that court must consider whether "substantial justice will be done in the appropriate forum"); *Safari v. The Iran Afzal* [1996] 2 F.C. 954, 970-71 (Fed. Ct. T.D.) (Can.) (stating

pressionistic.<sup>324</sup> Ultimately, however, the question in both civil litigation and in extradition cases is the same: Will justice be done in the foreign court? The mere fact that the procedural and substantive law in the foreign forum might differ from that of the domestic forum will not prevent a stay on the basis of forum non conveniens doctrine. In both extradition and conflict of laws cases, domestic courts must invoke a conception of justice that at once guarantees fairness to the litigants and is not too parochial.

The key question is not *whether* the foreign law that determines the punishment the fugitive will face in the requesting state would fail Charter scrutiny, but *how* it fails. The Supreme Court suggested in *Schmidt* that it is the fairness of the foreign system as a whole that should be evaluated; the details invariably will differ.<sup>325</sup> It might be better to view the Charter as applying to the results of the foreign criminal justice process rather than the particular elements of foreign procedure, which are bound to seem strange to Canadians. This is where section 7 fits in, with its focus on substantive rather than merely procedural due process. Charter review of ministerial surrender decisions should be primarily concerned with substance, not procedure.<sup>326</sup> At a certain point, demonstrably arbitrary or unfair foreign *procedure* would transgress international human rights law norms and thus run afoul of the Charter in the extradition context. But within these confines, some measure of latitude should be granted to foreign criminal justice systems to accommodate procedural and, to a certain degree, substantive diversity.<sup>327</sup>

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that party's claim that he will be denied substantial justice in the foreign court must be backed up by evidence); Frymer v. Bretschneider [1994] 19 O.R.3d 60, 67 (Ont. C.A.) (Can.) (Weiler, J., dissenting on other grounds) (stating that as part of forum non conveniens determination, court will consider "cogent evidence" that "plaintiff will not obtain justice in the foreign jurisdiction"); The Abidin Daver [1984] App. Cas. 398, 411 (H.L.) (appeal taken from Eng.) (holding that party must support allegations that fair trial is not possible in foreign state with "positive and cogent evidence," and not mere allegations); Muduroglu Ltd. v. T.C. Ziraat Bankasi [1986] Q.B. 1225, 1248 (Eng. C.A.) (holding that in deciding whether to order stay in favor of foreign proceedings, court will consider whether party can receive fair trial in foreign state and also will consider party's personal safety).

324. See Connelly v. R.T.Z. Corp. [1996] 2 W.L.R. 251, 259 (Eng. C.A.), *rev'd on other grounds*, [1997] 3 W.L.R. 373 (H.L.) (appeal taken from Eng.) ("It will seldom be possible or desirable to undertake more than an impressionistic survey of the competing features of the two regimes.").

325. See R. v. Schmidt [1987] 1 S.C.R. 500, 527 (Can.); see also Chan c. Directrice de la Maison Tanguay [1996] 113 C.C.C.3d 270, 300 (Que. C.A.) (Can.) (finding that although Hong Kong mens rea element for murder is lower than Canadian counterpart, rendition to face trial in Hong Kong does not violate fugitive's rights in Canada), *leave to appeal refused*, [1997] 114 C.C.C.3d vi (Can.); Soffitt v. United States [1993] 36 B.C.A.C. 155, 158 (B.C. C.A.) (Can.) (holding mere differences between foreign practice and Charter standards are insufficient to violate principles of fundamental justice under section 7); cf. Derby & Co. v. Weldon (No. 6) [1990] 1 W.L.R. 1139, 1156 (Eng. C.A.) (Staughton, L.J., concurring) ("[O]ne can still conclude (as I do) that the Swiss rule as to the enforcement of foreign judgments, although different from our own rule, is one which can reasonably be adopted by a civilised system of law.").

326. This approach is supported by Soffitt [1993] 36 B.C.A.C. at 158.

327. See *Amchem* [1993] 1 S.C.R. at 912 ("In this climate, courts have had to become more tolerant of the systems of other countries.")

### E. Policy Considerations: The Safe Haven Argument

The so-called "safe haven" argument,<sup>328</sup> one of the main pillars of Justice La Forest's decision in *Kindler*, is also an essential consideration in establishing the appropriate standard of review.<sup>329</sup> Although there are strong arguments in its favor, it may seem a disreputable slippery slope argument if not properly articulated. The extradition process cannot function properly if courts allow the standard of review of ministerial surrender decisions to drift away from the residual threshold standard and instead permit it to become intrusive and subjective. Undue delay and a de facto subjection of foreign law to Charter scrutiny will result; neither is desirable.

The safe haven concern arises in two distinct situations. The first involves cases in which the fugitive cannot be prosecuted in Canada because the Canadian authorities lack prescriptive jurisdiction over the offense, most likely because it was committed abroad with no harmful effects in Canada. In these cases, the fugitive must either be surrendered for extradition to the requesting state or be freed because he or she could not be prosecuted in Canada. There is also the possibility of deportation if the fugitive is not a Canadian citizen and has entered the country illegally, although deportation is itself subject to legal controls and is not a true substitute for extradition.<sup>330</sup> But generally, in these cases—including *Kindler*, *Ng*, *Jamieson*, and probably *Ross*—the safe haven problem is stark, in the sense that the courts were forced to choose between allowing the fugitive to be surrendered for extradition or setting him or her free.

The second situation involves cases in which the offense at issue was of a transnational nature—that is, where elements of the offense were committed both in Canada and elsewhere—so that the Canadian authorities can choose whether to press charges in Canada or to extradite the fugitive to face prosecution abroad. Although it technically may be possible to prosecute the fugitive domestically, other factors may indicate that the foreign jurisdiction is the better place to bring charges and indeed that a prosecution in Canada would be unlikely to succeed. Obviously, the safe haven problem probably only will arise where there is a disparity in the sentences imposed by each state, so that the fugitive is resisting extradition by arguing that he or she

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328. See *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779, 836 (Can.); see also *Idziak v. Canada (Minister of Justice)* [1992] 3 S.C.R. 631, 662 (Can.) ("The state from which a fugitive is requested has a legitimate interest in seeing that it does not become a haven for criminals."). As outlined in Subsection II.B.1, these concerns might be better addressed by way of a section 1 analysis through a broader definition of "public." See *Libman v. R.* [1985] 2 S.C.R. 178 (Can.).

329. For the reasons outlined in Subsection II.B.1, this Article argues that the safe haven argument is more appropriately considered under section 1 of the Charter than under section 7.

330. See HUGH M. KINDRED ET AL., *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA* 489–90 (5th ed. 1992) (discussing legal controls on deportation); Michell, *supra* note 53, at 391 (distinguishing deportation from extradition).

should be prosecuted domestically. I am primarily concerned here with the first situation; the second is considered in more detail in Part V.<sup>331</sup>

Justice Taylor in *Ross* claimed that the extradition system would be undermined if Canadian citizens could simply return to Canada after having committed offenses in a foreign state there and effectively resist extradition solely on the basis of Canadian nationality or because the punishment they would face in the requesting state would not technically meet Charter scrutiny. Something more would be required to justify judicial intervention.<sup>332</sup> Such counterbalancing factors are best considered according to an international public interest argument under section 1 of the Charter.

## F. Conclusion

This Part has addressed the thorny question of how the residual threshold standard of review should operate in practice. Notwithstanding the Supreme Court of Canada's indication that courts should intervene only in the most compelling circumstances, the existence of a residual threshold standard requires as clear an indication as possible of the circumstances in which the courts will intervene. The Court has attempted to illustrate the high threshold for intervention by invoking the language of "shocking the conscience," suggesting that intervention will be appropriate only where it would be "simply unacceptable" to surrender a fugitive for extradition. Although this language is powerful, it is also amenable to multiple interpretations. Not surprisingly, commentators and courts alike are uncomfortable with a test that does not appear to be moored to more objective elements.

More generally, courts must examine both the substantive law and criminal justice system in the requesting state when the fugitive alleges that his or her section 7 Charter rights would be violated by extradition. At the same time, the courts must be cognizant of their limited ability to evaluate foreign law and legal systems, and that this awareness should direct them to intervene only in obvious and extreme situations. Moreover, the courts must

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331. The relevance of Canadian citizenship to the safe haven problem is unclear. The impact of Canadian citizenship on the extradition process is addressed in more detail in Part IV, but it also has specific relevance here. In *Kindler*, the Supreme Court of Canada emphasized that the fugitive in that case was a U.S. national, perhaps implying that Canadian nationality might raise different considerations. See *Kindler* [1991] 2 S.C.R. at 831, 834-35, 836 (La Forest, J., concurring); *id.* at 853 (McLachlin, J., concurring). This distinction was alluded to by Justice Lambert, dissenting in *United States v. Ross* [1994] 119 D.L.R.4th 333, 345, 350 (B.C. C.A.) (Can.) (Lambert, J., dissenting), and explicitly noted by the majority in *United States v. Burns* [1997] 116 C.C.C.3d 524, 535 (B.C. C.A.) (Can.). It is not clear, however, why the safe haven argument ought to be structured in this manner. Although Canada should not be a safe haven for foreign citizens who commit offenses abroad and then escape to Canada, neither should it be a safe haven for Canadian citizens who commit serious offenses abroad and then return. The international public interest argument developed above would not distinguish between the two situations.

332. See *Ross* [1994] 119 D.L.R.4th at 367 (Taylor, J., concurring); *id.* at 373 (Finch, J., concurring) ("The Charter right to remain in Canada could surely not have been intended to create a safe haven for Canadian citizens minded to commit criminal acts abroad.").

require fugitives to advance cogent evidence—not merely allegations—that they face a real risk of being subjected to unconstitutional treatment in the requesting state.

In an effort to ground the residual threshold standard in more objective factors, this Article endorses an approach that would see domestic courts make greater reference to and use of international human rights law to inform the interpretation of the requirements of the open-textured language of the Charter. In several circumstances, there are widely recognized human rights norms that could be invoked by a domestic court as tangible evidence that anticipated treatment or punishment in the requesting state would “shock the conscience.” Yet it must also be recognized that there are a number of fields in which no human rights norms are evident on the international plane, or else the extant norms are as broad as the domestic constitutional provisions. Domestic courts should view the absence of international human rights norms with reference to a particular subject as evidence that no consensus exists on the subject in the international community, suggesting that extradition to face such treatment or punishment would not violate the Charter.

Even in the absence of international human rights norms, courts may wish to guide the operation of the residual threshold standard by reference to the Fugitive Offenders Act, on the theory that fugitives facing extradition under the Extradition Act should be accorded at least the same degree of procedural protection that is provided to fugitives under the Fugitive Offenders Act. Though such differences are often minor, there are distinctions between the two Acts that may aid a domestic court in articulating the operation of the residual threshold standard in a particular case. A review of the approach adopted by the courts in civil conflict of laws cases is instructive for courts exercising constitutional judicial review of ministerial surrender decisions. As the conflict of laws jurisprudence demonstrates, courts should adopt a generally deferential approach to foreign laws and legal systems and should intervene only in exceptional circumstances.

#### IV. CANADIAN CITIZENSHIP IN THE EXTRADITION PROCESS

##### A. *Introduction*

The relevance of Canadian citizenship to the extradition process remains uncomfortably uncertain. As a general matter, Canada historically has followed the practice of other common law countries in extraditing its own citizens as well as foreigners. Section 6(1) of the Charter, however, indicates that “[e]very citizen of Canada has the right to enter, remain in and leave Canada.”<sup>333</sup> In *Ross*, *Whitley*, *Leon*, and *Burns*, each of the fugitives argued that in the circumstances of his case, extradition to the United States would

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333. Charter § 6(1).

violate his rights under section 6(1) of the Charter and that the violation could not be upheld under section 1.

Such an argument is based on three related propositions.<sup>334</sup> First, the relevance of Canadian citizenship to the extradition process has not yet been settled. The Charter's section 6(1) guarantee is explicitly limited to Canadian citizens and might appear to subject the extradition of Canadian citizens to heightened constitutional scrutiny. Indeed, the section might suggest that Canadian citizens cannot be extradited at all. The Supreme Court has not determined conclusively what benefits flow from Canadian citizenship in the extradition context. It would be surprising if there were none at all.<sup>335</sup> Yet there is reason to doubt that the scope of section 6(1) of the Charter can be stretched as broadly as the majority of the British Columbia Court of Appeal did in *Burns*, where the court held that section 6(1) prevents the extradition of a Canadian citizen to face the death penalty.<sup>336</sup>

The second issue is the relevance of the fugitive's amenability to prosecution in Canada to judicial review of ministerial surrender decisions. This issue arises only where the offense in question is of a transnational nature (i.e., drug trafficking cases such as *Ross* and *Whitley*, but not *Jamieson*, and arguably not *Leon*) where two or more states (of which Canada is one) have prescriptive jurisdiction over the crime. Where the fugitive is a Canadian citizen who could be charged in more than one state with an offense stemming from the same transaction, section 6(1) might indicate a presumption in favor of trial in Canada. If section 6(1) means anything in the extradition context (and even *United States v. Cotroni* suggests that it must provide some measure of protection for Canadian citizens),<sup>337</sup> it may place an obligation upon the Canadian authorities to proceed with charges against the fugitive in Canada rather than surrender him for extradition, unless they can demonstrate that extradition and trial abroad is more appropriate under the circumstances.<sup>338</sup>

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334. See *United States v. Swystun* [1987] 50 Man. R.2d 129, 132-3 (Man. Q.B.) (Can.) (asking similar questions); Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191, 200 (1992) (framing issue of refusing extradition on basis of Canadian citizenship as consisting of three questions).

335. Cf. SECRETARY OF STATE FOR EXTERNAL AFFAIRS, INTERNATIONAL JUDICIAL CO-OPERATION: LEGAL SERVICES PROVIDED BY THE DEPARTMENT OF EXTERNAL AFFAIRS WITH RESPECT TO INTERNATIONAL JUDICIAL CO-OPERATION AND OTHER MATTERS 34 (1987) ("The Canadian Charter of Rights may, in certain circumstances, prevent the extradition of a Canadian citizen."); John B. Laskin, *Mobility Rights Under the Charter*, in 4 SUPREME COURT LAW REVIEW 89, 93 (E.P. Belobaba & E. Gertner eds., 1982) (asserting that "section 6(1) may call for a more careful exercise of the discretion to surrender Canadian citizens").

336. See *Burns* [1997] 116 C.C.C.3d at 533-36.

337. See *United States v. Cotroni* [1989] 1 S.C.R. 1469, 1480 (Can.).

338. This proposition is premised on the assumption that in most cases a fugitive who is a Canadian citizen would prefer to be prosecuted in Canada rather than abroad, in part due to cultural factors, but largely because penalties in Canada will often—although not invariably—be less severe than punishment abroad. See, e.g., *United States v. D'Agostino* [1997] 41 C.R.R.2d 325, 327 (Ont. Gen. Div.) (Can.). This position raises the question of what would happen in a transnational offense case in which a Canadian



The third issue, closely related to the second, concerns judicial review of prosecutorial discretion in transnational offense cases. The issue was raised in *Leon*, although ultimately the Ontario Court of Appeal held that *Leon* was not truly a transnational offense case, an opinion that the Supreme Court of Canada apparently shared. The issue revolves around the existence and scope of a constitutional right of Canadian fugitives to be prosecuted in Canada where it is possible or reasonable to do so. If there is such a right implicit in section 6(1) of the Charter, then by necessity the exercise of prosecutorial discretion must be amenable to judicial review where charges are either stayed or not commenced in Canada so that a fugitive may be surrendered for extradition to a requesting state.

In the sections that follow, this Article contends that the Supreme Court of Canada has been right not to elevate the protection provided by section 6(1) of the Charter to a level of importance such that it would seriously interfere with the ability of the government to extradite Canadian citizens. It follows from this argument that the British Columbia Court of Appeal erred in *Burns*. Although the Supreme Court of Canada reached the right result in *Cotroni*, the leading case, its process of reasoning—and in particular, its section 1 analysis—is open to criticism.

## B. *The Relevance of Canadian Citizenship to the Extradition Process*

### 1. *Cotroni and Its Aftermath*

The leading case on the impact of section 6(1) of the Charter upon the extradition process is *United States v. Cotroni*.<sup>339</sup> In two conjoined appeals, the Supreme Court of Canada held that the surrender of a Canadian citizen for extradition violated his section 6(1) right to remain in Canada and that the violation could be upheld under section 1. Justice La Forest's majority opinion conceded that the extradition of a Canadian citizen would constitute a *prima facie* violation of section 6(1) but held that "the infringement to s. 6(1) that results from extradition lies at the outer edges of the core values sought to be protected by that provision."<sup>340</sup> In Justice La Forest's view, section 6(1) was intended to provide constitutional protection against such practices as expulsion and banishment, not extradition.<sup>341</sup>

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citizen faces a more *lenient* sentence abroad; presumably, it might then be argued that there is a right to be extradited.

339. [1989] 1 S.C.R. 1469 (Can.).

340. *Id.* at 1481. In support of this view, Justice La Forest relied upon the European Convention experience to that point in time. The subsequent decision in *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), however, indicates that European jurisprudence has evolved since *Cotroni* and actually seems to undermine the proposition that Justice La Forest advanced.

341. See *Cotroni* [1989] 1 S.C.R. at 1481-83.

Justice La Forest held that any violation of section 6(1) occasioned by extradition could be upheld under section 1.<sup>342</sup> In contrast to the discussion above of the section 7 issue, section 1 plays the lead role in section 6(1) cases, in that section 6(1) violations have been upheld under section 1. Indeed, given that section 6(1) violations may be upheld under section 1, it is difficult to see under the existing case law what protection section 6(1) provides to Canadian citizens facing extradition (other than placing the onus on the government to justify the violation of the section 6(1) right under section 1).

Justice La Forest indicated that even where it was technically possible to prosecute a fugitive in Canada for a transnational offense, it would in many cases be more appropriate to extradite the fugitive to face trial in the state where the harm of the crime was felt.<sup>343</sup> This is not merely a matter of convenience, although that is also an important consideration.<sup>344</sup> Rather, the state where the harm was suffered has a greater interest in exercising the social functions of assuring justice and imposing punishment.<sup>345</sup> In transnational offense cases, however, as in conflict of laws cases involving multi-jurisdictional torts, it is often difficult to isolate the harm caused by a crime to a single jurisdiction, and indeed, it is unclear why it must be so isolated.<sup>346</sup> There was some disagreement on this point in the cases under discussion.<sup>347</sup> Justice Lambert, dissenting in *Ross*, suggested that because the ultimate harm in that case—the distribution of drugs—presumably would have taken place in Ontario if the drug trafficking scheme had succeeded, Canada had a greater interest in prosecuting the offense than did Florida.<sup>348</sup>

The transnational nature of drug trafficking, with various elements of the offense scattered across two or more states, suggested to Justice La Forest that the physical location of the crime rarely could be confined to only one state in order to establish criminal jurisdiction. Justice La Forest indicated that although the physical location of an offense was a relevant consideration for jurisdictional purposes, courts must adopt a more flexible approach to jurisdictional questions in cases of transnational crime.<sup>349</sup> As the

342. This approach had also been taken in a number of early cases in lower courts. See *supra* note 29.

343. See *Cotroni* [1989] 1 S.C.R. at 1488.

344. See Bert Swart, *Refusal of Extradition and the United Nations Model Treaty on Extradition*, 23 NETH. Y.B. INT'L L. 175, 190 (1992).

345. See *Cotroni* [1989] 1 S.C.R. at 1488, 1495; see also *Idziak v. Canada* (Minister of Justice) [1992] 3 S.C.R. 631, 662 (Can.).

346. See *Libman v. R.* [1985] 2 S.C.R. 178, 209 (Can.); Morgan, *supra* note 102, at 271.

347. See, e.g., *United States v. Ross* [1994] 119 D.L.R.4th 333, 358 (B.C. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 469 (Can.).

348. See *id.*

349. This course was taken by the Court in *Libman*, which held that courts may exercise subject matter jurisdiction when there is a "real and substantial link" between the offense and Canada. See *Libman* [1985] 2 S.C.R. 178. For example, where a fugitive is accused of involvement in a trafficking scheme to import drugs from Canada to the United States, it might be thought that the United States would have a stronger interest in prosecuting the fugitive, given that the harm of the offense did (or would have) occurred there. This would not suggest, however, that Canada would be unable to prosecute the fugitive, and

place of wrongdoing was not the decisive factor for criminal law jurisdiction over transnational crime, neither should it be accorded undue weight for the purposes of domestic constitutional law, especially under section 6(1). It is the physical presence of the fugitive in Canada, not the place of alleged wrongdoing, that implicates section 6(1) in the extradition context where the fugitive is a Canadian citizen.<sup>350</sup>

## 2. *The Alleged Interrelationship Between Section 6 and Section 7 of the Charter and the Obligation to Prosecute in Canada*

Justice Lambert in *Ross* advanced an interesting but ultimately impractical argument based upon what he called the intertwined application of sections 6 and 7. He thought that the fugitive's willingness to plead guilty to charges in Canada that would arise on the evidence removed the significance of a number of the elements of the *Cotroni* equation (i.e., the forum non conveniens-type test set out in *United States v. Swystun*) and was decisive of the issue as to whether a prosecution in Canada would be realistic. When combined with the mandatory minimum sentence argument, Justice Lambert held that the Florida punishment was disproportionate and so weighed heavily against surrendering the fugitive to Florida, particularly given his constitutional right under section 6(1) to remain in Canada. Other courts also have identified the citizenship of the fugitive as a factor in determining whether there has been a section 7 or section 12 violation.<sup>351</sup> Yet it is difficult to escape the conclusion that Justice Lambert intermingled the two grounds (sections 6 and 7) because neither of them would have survived independently.<sup>352</sup>

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it could not be denied that such activities cause a certain harm to the Canadian public as well. Both states, therefore, possess a valid interest in seeking the presence of the fugitive for prosecution.

350. See *Cotroni* [1989] 1 S.C.R. at 1493. In her dissenting opinion, Justice Wilson argued that under the circumstances, the violation of section 6(1) could not be upheld under section 1. See *id.* at 1501-16. The primary factor influencing her decision was the fact that elements of the offense had been committed in Canada:

I emphasize that we are dealing in these cases with a very narrow issue. We are not dealing with circumstances in which a Canadian citizen who has committed an offence in a foreign country seeks to resist extradition on the basis of his right under section 6(1) of the Charter to remain in Canada. Such a claim would, in my opinion, fail.

*Id.* at 1510. Justice Wilson thus disagreed with Justice La Forest's view that the locus of the offense was irrelevant for constitutional purposes. Moreover, extradition of a Canadian citizen where prosecution in Canada was an option violated section 6(1) and could not be upheld under section 1 because it violated the minimal impairment element of the proportionality branch of the *Oakes* test. See *R. v. Oakes* [1986] 1 S.C.R. 103, 135-40 (Can.). Justice Sopinka also dissented and would have found a violation of section 6(1) that could not be upheld under section 1. See *Cotroni* [1989] 1 S.C.R. at 1517-20.

351. See *United States v. Garcia* [1994] O.J. No. 1027, ¶¶ 52-53 (Ont. Gen. Div.) (Can.) (suggesting that section 12 affords fugitive no relief from extradition to United States because of fugitive's American citizenship), *appeal dismissed*, [1996] 31 W.C.B.2d 458 (Ont. C.A.) (Can.), *leave to appeal refused*, [1997] 34 W.C.B.2d v (Can.).

352. But see *United States v. Dikken* [1996] A.Q. No. 1340, ¶ 21 (Que. C.A.) (Can.) (Fish, J., concurring) ("Section 6(1) of the Charter does not grant persons who commit offences triable both here and abroad the right to choose the jurisdiction in which they will be prosecuted."), *leave to appeal refused*, [1996] 3 S.C.R. vii (Can.).

The British Columbia Court of Appeal's decision in *Burns* pushed Justice Lambert's reasoning in *Ross* to its logical extreme and highlighted its deficiencies. In *Burns*, the Court held that section 6(1) of the Charter prohibits the extradition of a Canadian citizen to face the death penalty in a requesting state and that the violation of section 6(1) could not be upheld under section 1. The constitutionality of surrendering a Canadian citizen to face the death penalty abroad was a matter of first impression. Constrained by the Supreme Court's reasoning in *Kindler* and *Ng*, the British Columbia Court of Appeal rejected the fugitives' argument that the decision to surrender them to face the death penalty in Washington violated either section 7 or section 12 of the Charter.<sup>353</sup> But in both *Kindler* and *Ng*, the fugitives were foreigners. In *Burns*, by contrast, the fugitives were Canadian citizens and thus were entitled to section 6(1) protection. The majority held that this was a distinction with a difference.

The *Burns* majority observed that *Cotroni* had concluded that the surrender of a Canadian citizen for extradition constitutes a violation of section 6(1) of the Charter. The *Cotroni* court also held, however, that the violation of section 6(1) could be upheld under section 1 of the Charter. The majority in *Burns* interpreted Justice La Forest's reasoning in *Cotroni* to be based on the view that extradition could be distinguished from exile and banishment—the primary evils sought to be addressed by section 6(1)—on the basis that a Canadian citizen always could return to Canada after trial and punishment (if any) in the requesting state. In short, extradition was not permanent.<sup>354</sup> Yet where the death penalty was a possibility, Justice Donald held, extradition *could* be permanent. As such, it amounted to permanent exile or banishment, and thus the violation of section 6(1) that it occasioned could not be upheld under section 1 of the Charter because it did not only minimally impair the fugitives' rights.<sup>355</sup> Without an assurance that they would not be executed, the extradition of Canadian citizens violated the Charter.<sup>356</sup>

It would appear to follow that extradition of a Canadian citizen to face a mandatory life sentence in the requesting state would also be unconstitutional, because it too would be "permanent." Justice Donald recognized this counterargument and attempted to deflect it by claiming that mandatory life imprisonment could be distinguished because of the possibility of release, clemency, or return to serve the remainder of the sentence in Canada under transfer of prisoners treaties and legislation.<sup>357</sup> Yet this rejoinder proves too much, both because the possibility of release or clemency also exists for fugitives who face the death penalty in the requesting state and because there is

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353. See *United States v. Burns* [1997] 116 C.C.C.3d 524, 529, 536 (B.C. C.A.) (Can.).

354. See *id.* at 534–37; *id.* at 543 (McEachern, C.J., concurring).

355. This decision was made under the Charter section 1 test outlined in *Oakes*. See *id.* at 534–35.

356. See *id.* at 544.

357. See *id.* at 535.

no obligation upon the Minister to allow a fugitive imprisoned abroad to be transferred to serve the remainder of his or her sentence in Canada.

The Minister argued that while the age of the fugitives should be taken into account, it was not a determinative factor in his decision to surrender the fugitives or to seek assurances that the death penalty would not be imposed or executed. Similarly, the Minister indicated that the citizenship of the fugitives was merely another factor to be considered, not a trump card prohibiting surrender or requiring assurances that the death penalty would not be imposed or executed. Justice Donald held that the Minister had erred. In so holding, he stated that the "safe haven" argument upon which Justice La Forest had relied in *Kindler* applied only to foreign fugitives, and not to Canadian citizens.<sup>358</sup> This argument cannot withstand scrutiny, however, because it ignores the international public interest argument developed above. Canada has a strong interest in ensuring that it does not become a safe haven for foreign citizens who commit offenses abroad and then enter Canada hoping to escape responsibility for the consequences. Yet Canada has an equally important interest in ensuring that it does not become a refuge for Canadians who commit crimes abroad.<sup>359</sup>

The reasoning of the majority in *Burns*, and of Justice Lambert in *Ross*, is based on a fundamental misconception. In *Ross*, Justice Lambert asserted that the fugitive, as a Canadian citizen, should not be required to pay what Justice Lambert regarded as a disproportionate penalty in Florida. He did so on the unusual argument that there was no relationship between the fugitive and Florida. Had the fugitive been a citizen of Florida, Justice Lambert held, then "under the democratic process he would be responsible for the legislation in Florida and the legislators in Florida would be responsible to him."<sup>360</sup> An element of Justice Lambert's argument rings true: The legitimacy of a state's application of its law (criminal or otherwise) to an individual or transaction always depends upon the strength of the connection between the state and the individual or transaction. Consent in some form is the primary type of legitimate connection for jurisdictional purposes.<sup>361</sup> For example, when courts are faced with the question of whether to enforce a foreign judgment, they must satisfy themselves that the foreign court properly exercised jurisdiction over the case. Whether on the new test ("real and sub-

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358. See, e.g., *id.* at 541; *Kindler v. Canada* (Minister of Justice) [1991] 2 S.C.R. 779, 835-839, 853 (Can.).

359. See *supra* note 331.

360. *United States v. Ross* [1994] 119 D.L.R.4th 333, 358 (B.C. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 469 (Can.).

361. See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1297-1303 (1989). Even the "effects doctrine" can be explained on this basis, because the effects of criminal activity must have been foreseeable by the defendant, so that he or she may be considered to have chosen to subject him- or herself to foreign law. See *United States v. Cotroni* [1989] 1 S.C.R. 1469 (Can.) (allowing extradition of Canadian citizen to United States even though offense was committed in Canada because it had foreseeable effects in United States).

stantial connection")<sup>362</sup> or the old one (presence, submission, or explicit consent),<sup>363</sup> the consent, implicit or otherwise, of the defendant to the application of foreign law to him or her is a central consideration.

But it is a far cry from the rather general proposition that there must be a legitimate connection between a state and an individual in order for the state to apply its law to the individual, to argue that it is illegitimate for a state to apply its criminal law to an individual who is not a citizen of the state. Consent can manifest itself in many forms. One such important form of consent is voluntary submission. The territorial theory of jurisdiction, a bedrock principle of Canadian law, indicates that the substantive law that will apply to an individual or transaction is determined by the state in whose territory he or she is located, a view recently reaffirmed with vigor by the Supreme Court of Canada in the conflict of laws context.<sup>364</sup>

Yet this view is not the whole story. Where an individual voluntarily acts in such a way as to cause foreseeably harmful effects in a foreign state, that foreign state legitimately may subject the individual to criminal prosecution. Given a territorial nexus or voluntary creation of harmful effects, the nationality of the individual is simply irrelevant. The fugitive in *Ross* had traveled voluntarily to Florida and must have known that Florida law would apply to him.<sup>365</sup> Taken to its logical conclusion, Justice Lambert's "consent" argument would have undesirable consequences and would be unworkable in practice. It is blind to the reality of transnational crime and smacks of the splendid isolationism that the Supreme Court of Canada has decried.<sup>366</sup> Indeed, as argued above, the courts properly take jurisdiction over an offense even when many of the elements of the crime occurred outside the country.<sup>367</sup>

Justice Lambert readily acknowledged that his decision would confer greater rights upon Canadian citizens than upon foreigners. Yet he suggested that what he proposed for Canada was no different from what civil law countries had done for themselves under their extradition treaties. Those countries, however, had negotiated such provisions under their treaties and also habitually prosecute on the basis of nationality rather than territoriality.<sup>368</sup> Nothing in international law indicates that states may not extradite

362. *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, 1106-07 (Can.).

363. See *Emanuel v. Symon* [1908] 1 K.B. 302, 309 (Eng. C.A.).

364. See *Tolofson v. Jensen* [1994] 3 S.C.R. 1022, 1049-50 (Can.); see also *Harrer v. R.* [1995] 3 S.C.R. 562, 589 (Can.) (applying Charter). A possible exception may exist for cases of involuntary presence in the territory, see *Michell*, *supra* note 53, at 390 n.23 (listing several forcible abduction cases), but this would have no application on the facts of the cases under discussion here. Mere citizenship alone does not establish a real and substantial connection to the forum in the civil context. See *Nicholas v. Nicholas* [1996] 94 O.A.C. 21, 25 (Ont. C.A.) (Can.).

365. See *Ross* [1994] 119 D.L.R.4th at 368-70.

366. See *Morguard* [1990] 3 S.C.R. at 1095 (stating that states cannot exist in "splendid isolation"); *Libman v. R.* [1985] 2 S.C.R. 178, 214 (Can.) (discussing international public interest).

367. See *Libman* [1985] 2 S.C.R. at 178.

368. See *Ross* [1994] 119 D.L.R. 4th at 558; see also *LA FOREST*, *supra* note 3, at 99-100 (discussing state's discretion to refuse extradition on basis of nationality).

their own nationals. Justice Lambert's proposal is radical and extravagant. It and the British Columbia Court of Appeal's decision in *Burns*, which flows from it, should be rejected.

C. *Relevance of Citizenship in Cases Where the Fugitive Could Be Prosecuted in Canada*

According to the Supreme Court of Canada in *Cotroni*, the Canadian Government's ability to prosecute a Canadian citizen in Canada for an offense is not a bar to his extradition to face charges in the requesting state arising out of the same circumstances. Two types of cases must be distinguished: first, those where the fugitive could be prosecuted in Canada; and second, those where he or she could not. The main issue in *Cotroni* was whether section 6(1) conferred a right on a Canadian citizen to be tried in Canada rather than surrendered for trial abroad where possible. Justice La Forest denied that section 6(1) conferred any such right. As a general proposition, this seems appropriate for the second type of case, but probably goes too far for the first.<sup>369</sup>

In this section, I argue that section 6(1) of the Charter could be accorded an appropriate degree of weight in the extradition context by imposing a *forum non conveniens*-type test in transnational offense cases. That is, in cases involving a fugitive who is a Canadian citizen charged with an offense of a transnational nature and who is amenable to prosecution for that offense in more than one state, section 6(1) of the Charter should require that the Canadian authorities satisfy the court on a civil burden of proof that prosecution in Canada (rather than extradition to face prosecution abroad) is not a realistic option.

The fugitives in *Cotroni* argued that the particular circumstances of their case took it outside the operation of the general principle that Canadian citizenship was essentially irrelevant to the extradition process. Justice La Forest disputed the fugitives' characterization as colorable because the offenses in question were essentially "transnational in nature."<sup>370</sup> So although the fugitives technically had not been physically present in the United States, it was clear that they had, in a sense, acted there by causing harm there. This also seems correct: The fugitives were involved in efforts to ship drugs into the United States for distribution there, so the harmful effects of the offense were mostly (though not entirely) manifested in the United States. Of

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369. *Cotroni* was complicated by the fact that the fugitives in that case, Canadian citizens, were sought by the U.S. government for offenses which seemed to have been committed entirely within Canada, although with harmful effects in the United States. See *United States v. Cotroni* [1989] 1 S.C.R. 1469, 1477 (Can.); see also *United States v. Swystun* [1987] 50 Man. R.2d 129, 133-34 (Man. Q.B.) (Can.) (discussing rationale of lower court decision in *Cotroni*).

370. *Cotroni* [1989] 1 S.C.R. at 1493.

course, the fugitives' activities also may have had harmful effects in Canada that would have justified their prosecution in Canada.

In the second kind of case, where the fugitive could not be prosecuted in Canada for either jurisdictional or practical reasons, the only alternatives would be to attempt to prosecute the fugitive on the basis of nationality jurisdiction or to set him or her free. Obviously, the latter alternative would be unpalatable in the vast majority of cases, although adoption of the residual threshold standard necessarily leads one to take the view that allowing the fugitive to go free still would be preferable to sending a fugitive to face torture or other "incontrovertibly shocking" punishments in the requesting state. Such a result is inevitable, however, if Canadian citizens can rely upon section 6(1) to resist extradition for offenses committed abroad, because Canadian authorities have no general power to prosecute Canadians for foreign offenses solely on the basis of their Canadian nationality.<sup>371</sup> If Canada is to decline to surrender fugitives for extradition where they would face violations of their human rights in the foreign state, it would be desirable to enact legislation enabling the fugitives to be prosecuted in Canada for the offenses in question.<sup>372</sup>

Yet even this would not be an entirely satisfactory situation. First, such legislation could apply only to Canadian citizens. Canada could not prosecute foreign citizens for crimes committed outside Canada that had no effects in Canada, which would lead to anomalous results in cases involving both Canadian and non-Canadian fugitives. Second, even in the case of the prosecution of Canadian citizens under legislation that provided for the exercise of Canadian criminal jurisdiction over them on the basis of the nationality principle, the practical obstacles to an effective prosecution would often prove overwhelming, as Justice La Forest stressed in *Cotroni*.<sup>373</sup> Indeed, it is pre-

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371. Unlike many civil law states, which couple their refusal to extradite their own nationals with an ability to prosecute their nationals on the basis of the nationality principle of jurisdiction, Canadian law makes only limited provision for the exercise of nationality-based prescriptive jurisdiction. This does not mean that under public international law, Canada could not exercise such jurisdiction over its nationals, only that historically it has not chosen to do so. With exceptions in a very narrow range of offenses, therefore, there is no basis in domestic law for exercising nationality-based jurisdiction. Canada has chosen to exercise prescriptive jurisdiction on the basis of the nationality principle only for offenses akin to treason, war crimes, and crimes against humanity. See *KINDRED ET AL.*, *supra* note 330, at 432. Recent legislation has amended the Criminal Code to endow Canadian courts with what is in effect extraterritorial jurisdiction to combat "child sex tourism" and related offenses abroad by Canadian citizens and permanent residents. See *An Act to Amend the Criminal Code (Child Prostitution, Child Sex Tourism, Criminal Harassment and Female Genital Mutilation)*, ch. 16, 1997 S.C. (Can.) (allowing for prosecution of Canadian citizens and permanent residents for acts or omissions committed outside of Canada that would constitute sexual offense against children if committed in Canada). Of course, Canadian legislation also allows Canadian courts to prosecute individuals under the universality principle, regardless of the nationality of the defendant or the location of the offense, although this jurisdiction may be invoked only in the most unusual circumstances. See *R. v. Finta* [1994] 1 S.C.R. 701, 807 (Can.).

372. See *Crime Knows No Country*, *GLOBE & MAIL* (Toronto), Feb. 17, 1996, at D6.

373. See *Cotroni* [1989] 1 S.C.R. at 1496-97. Nationality-based jurisdiction is strongly criticized in Sharon A. Williams, *Recent Developments in Extradition: Interstate Co-Operation and Individual Rights in Extradition Law: Can the Two Exist?*, *HAGUE Y.B. INT'L L.* 95 (1993); and E.P. AUGHTERSON,



cisely these practical obstacles that have given rise to the forum non conveniens doctrine in civil litigation.

Even in transnational cases in which it is technically possible to charge the fugitive in Canada, Justice La Forest rejected the contention that section 6(1) of the Charter imposes a general requirement that Canadian citizens be prosecuted in Canada.<sup>374</sup> He emphasized that the Canadian authorities "must in good faith direct their minds to whether prosecution would be equally effective in Canada, given the existing domestic laws and international cooperative arrangements. They have an obligation flowing from s[ection] 6(1) to assure themselves that prosecution in Canada is not a realistic option."<sup>375</sup> Should it be established that this discretion had been exercised for improper or arbitrary motives, the fugitive would have a remedy under section 24 of the Charter. Otherwise, the ministerial surrender decision would have to stand.

The majority judges at the court of appeal in *Jamieson II*, *Ross*, *Whitley*, and *Leon* followed Justice La Forest's lead in *Cotroni*. Justice Taylor in *Ross* did not accept that the extradition of a Canadian citizen to face charges in the United States violated section 6(1) of the Charter, even though bringing charges in Canada was not a realistic alternative to extradition:

I understand that expression ["realistic alternative"] to mean that the laying of charges in Canada would constitute a good reason for refusing extradition, and I do not understand how this could be said when the only justification for dealing with the matter in Canada would be so as to enable the appellant to secure a less severe punishment than that likely to be imposed in the only place where he is said to have actually sought to carry his unlawful plan into execution, and where he was arrested and committed for trial.<sup>376</sup>

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EXTRADITION: AUSTRALIAN LAW AND PROCEDURE 129 (1995), which observes that the principle of non-extradition of nationals is based upon "suspicion of foreign justice and legal systems."

374. Justice La Forest argued that

[a] general exception for a Canadian citizen who could be charged in Canada would, in my view, interfere unduly with the objectives of the system of extradition . . . . To require judicial examination of each individual case to see which could more effectively and fairly be tried in one country or the other would pose an impossible task and seriously interfere with the workings of the system.

*Cotroni* [1989] 1 S.C.R. at 1494.

375. *Id.* at 1498. It is unclear whether the reverse proposition holds—that Canadian officials might be obliged to seek extradition of Canadian citizens from abroad or their return under transfer of prisoners treaties and legislation. This position was suggested by the fugitive's argument in *Mackie v. Drumheller Institution* [1995] 2 W.W.R. 369, 377 (Alta. Q.B.) (Can.), *aff'd*, [1996] 111 C.C.C.3d 333 (Alta. C.A.) (Can.), and seems a logical extension from the fugitive's argument in *Wong v. Canada (Minister of Justice)* [1996] 37 C.R.R.2d 355 (B.C. C.A.) (Can.). In *Mackie*, the Alberta Court of Appeal held that the Canadian Government is under no obligation to seek extradition of a fugitive who flees Canada before serving his sentence to ensure that the Canadian sentence will be served concurrently with foreign sentences imposed for crimes committed while at large in the foreign jurisdiction.

376. *United States v. Ross* [1994] 119 D.L.R.4th 333, 369 (B.C. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 469 (Can.).

What, then, does "realistic option" mean? Regrettably, this question has not been adequately addressed. The Supreme Court in *Cotroni* set out the relevant factors for a review of the Minister's decision to either prosecute a fugitive domestically or to surrender him for extradition:

- (a) where the impact of the offense was felt or likely to have been felt;
- (b) which jurisdiction has the greater interest in prosecuting the offense;
- (c) which police force played the major role in the development of the case;
- (d) which jurisdiction has brought charges;
- (e) which jurisdiction has the most comprehensive case;
- (f) which jurisdiction is ready to proceed to trial;
- (g) where the evidence is located;
- (h) whether the evidence is mobile;
- (i) the number of accused involved and whether they can be gathered together in one place for trial;
- (j) in what jurisdiction most of the acts in furtherance of the crime were committed;
- (k) the nationality and residence of the accused; and
- (l) the severity of the sentence the accused is likely to receive in each jurisdiction.<sup>377</sup>

The origin of these factors is unclear. The Supreme Court of Canada adapted them from the trial decision in *Swystun*, but there is no indication in that case as to their provenance. Nonetheless, their resemblance to the factors in a forum non conveniens determination in civil litigation is unmistakable.<sup>378</sup> Similar factors are outlined in article 17 *bis* of the Canada-United States Extradition Treaty.<sup>379</sup> There are close parallels between conflict of

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377. See *Cotroni* [1989] 1 S.C.R. at 1498-99 (identifying these factors as those "that will usually affect" decision whether to prosecute in Canada or to surrender individual for extradition and prosecution abroad).

378. See *Amchem Prods., Inc. v. British Columbia (Workers' Compensation Bd.)* [1993] 1 S.C.R. 897, 915-22 (Can.) (outlining elements of forum non conveniens test); *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] App. Cas. 460, 474-78 (H.L.) (appeal taken from Eng.) (same).

379. Treaty on Extradition, Dec. 3, 1971, Can.-U.S., Can. T.S. No. 3. The treaty was amended in 1988:

If both contracting Parties have jurisdiction to prosecute the person for the offense for which extradition is sought, the executive authority of the requested State, after consulting with the executive authority of the requesting State, shall decide whether to extradite the person or to submit the case to its competent authorities for the purpose of prosecution. In making its decision, the requested State shall consider all relevant factors, including but not limited to:

- (i) the place where the act was committed or intended to be committed or the injury occurred or was intended to occur;
- (ii) the respective interests of the Contracting Parties;
- (iii) the nationality of the victim or the intended victim; and
- (iv) the availability and location of the evidence.

Protocol Amending the Treaty on Extradition, Jan. 11, 1988, Can.-U.S., 1991 Can. T.S. No. 37. For a discussion of judicial review of the Minister's surrender decision under art. 17 *bis*, see *United States v.*

laws principles and those that should guide courts in extradition cases. In both situations, the principal issue is the determination of the most appropriate forum for the trial of the action in order to provide justice to the parties.<sup>380</sup>

Admittedly, the rights of the fugitive in the extradition context have a more obvious constitutional dimension. The differences between extradition and civil litigation, however, should not be exaggerated. The Supreme Court of Canada has in recent years emphasized that the principles that underlie jurisdiction, choice of law, and the recognition and enforcement of foreign judgments are order and fairness, principles that possess quasi-constitutional status.<sup>381</sup> The importance of comity, which looms large in the extradition context, has also been emphasized in conflict of laws cases.<sup>382</sup> The same principles, I suggest, should guide extradition: Courts must ensure that fairness to the fugitive is balanced against the need to maintain order in the form of a smoothly functioning international extradition network.

Where an application is made for a stay of proceedings in civil litigation on the basis of the doctrine of *forum non conveniens*, the general presumption is that the forum is appropriate for trial of the action. The party seeking the stay in favor of trial abroad must demonstrate that some other forum is both available and clearly more appropriate.<sup>383</sup> A mere balance of convenience is insufficient.<sup>384</sup> This rule ensures that, as between the forum and the foreign state, the trial will take place in the most appropriate juris-

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Giannini [1994] O.J. No. 3268 (Ont. C.A.) (Can.), which rejects the argument that the Minister had failed to satisfy himself that domestic prosecution was not a realistic option.

380. See *Amchem* [1993] 1 S.C.R. at 919; *Guérin c. Canada* (Ministre de la Justice) [1996] R.J.Q. 1457, 1465 (Que. C.A.) (Can.), *leave to appeal refused*, [1996] 3 S.C.R. ix (Can.); *Spiliada* [1987] App. Cas. at 476.

381. See *Tolofson v. Jensen* [1994] 3 S.C.R. 1022 (Can.) (discussing choice of law in tort); *Amchem* [1993] 1 S.C.R. 897 (discussing anti-suit injunctions); *Hunt v. T&N plc* [1993] 4 S.C.R. 289 (Can.) (discussing constitutionality of provincial business records legislation); *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 (Can.) (discussing recognition and enforcement of foreign judgments). To date, the issues raised by *Morguard* and its progeny have been considered as constitutional limitations upon the jurisdiction of provincial superior courts and legislatures to proscribe and enforce. Underlying much of this discussion, however, is a strain of constitutional due process analysis, focusing upon the constitutional (i.e., section 7 of the Charter) implications of the exercise of jurisdiction over a person, rather than the federalism form of constitutionalism with its focus upon the ability of a particular province to exercise jurisdiction. A more American-style approach to jurisdictional issues might suggest that *Morguard* implicitly requires that courts observe due process limits to their exercise of jurisdiction.

382. See *Amchem* [1993] 1 S.C.R. at 930; *Morguard* [1990] 3 S.C.R. at 1096-97; *The Abidin Daver* [1984] App. Cas. 398, 411 (H.L.) (appeal taken from Eng.).

383. See *Frymer v. Brett Schneider* [1994] 19 O.R.3d 60, 67 (Ont. C.A.) (Can.); *Spiliada* [1987] App. Cas. at 476. Where the defendant is served *ex juris*, it is the plaintiff who must demonstrate that the forum is convenient. In the extradition context, might citizenship be considered analogous to being served *ex juris*? Where the fugitive is Canadian, it could be argued that the government should bear the burden on a civil standard of demonstrating that it would be more appropriate that the fugitive be tried in the requesting state. If the fugitive is a foreign citizen, then he or she bears the responsibility of showing that trial in Canada would be more appropriate.

384. See *Upper Lakes Shipping Ltd. v. Foster Yeoman Ltd.* [1993] 14 O.R.3d 548, 570-71 (Ont. Gen. Div.) (Can.); *Banco Atlantico S.A. v. British Bank of the Middle East* [1990] 2 Lloyd's Rep. 504, 508 (Eng. C.A.).

diction. The court must weigh a number of factors in making its determination,<sup>385</sup> and the higher courts are reluctant to intervene in the weighing process.<sup>386</sup> A similar approach, suitably modified to take into account the section 6(1) rights of the fugitive, also should apply in the extradition context.

Put simply, the place where the crime was committed may not always be the most appropriate place to prosecute it. As in conflict of laws cases addressing the location of a tort, there may be a certain degree of arbitrariness in the determination that the offense "took place" in only one state.<sup>387</sup> In transnational offense cases, which could give rise to prosecution either in Canada or abroad, the Supreme Court's requirement that prosecution take place in Canada when it is a realistic option to do so could be given substance by invoking a forum non conveniens-type test. The government would be required to demonstrate that, according to the factors outlined in *Swystun*, the fugitive should be tried in the foreign state.<sup>388</sup> The length of the sentence that the fugitive would face, either in Canada or abroad, would not be a consideration in this equation. If the Canadian Government could not discharge this burden, surrender for extradition should be quashed.

#### D. *Review of the Surrender Decision and the Good Faith of the Executive*

The third issue, judicial review of prosecutorial discretion in the extradition context, was not entirely resolved by *Leon*. The Supreme Court of Canada suggested in *R. v. Power* that it will only be in extreme circumstances ("the clearest of cases")<sup>389</sup> that the exercise of prosecutorial discretion will be quashed on judicial review and reiterated this view in *Leon*.<sup>390</sup> In theory, there are two distinct discretions being exercised: first, whether to prosecute the fugitive in Canada; and second, whether to surrender the fugitive for extradition.<sup>391</sup> In practice, however, the two issues are connected. Moreover, a process of consultation takes place between the various authorities, so that there is really only one exercise of discretion, in that one decision naturally follows from the other.<sup>392</sup> The discretion operates only in transnational offense cases, where the fugitive could be charged in more than

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385. See *Amchem* [1993] 1 S.C.R. at 917 (holding that court must look at factors to determine whether dispute has connections with one forum rather than another in order to determine where dispute should be litigated); *Spiliada* [1987] App. Cas. at 477-78 (same).

386. See *Spiliada* [1987] App. Cas. at 485-86.

387. See *Moran v. Pyle Nat'l (Canada) Ltd.* [1974] 43 D.L.R.2d 239, 242-50 (Can.) (examining various tests for determining location of tort); *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette, Inc.* [1990] 1 Q.B. 391, 443 (Eng. C.A.) (discussing problem of locating multi-jurisdictional torts).

388. See *United States v. Swystun* [1987] 50 Man. R.2d 129, 133-34 (Man. Q.B.) (Can.).

389. *R. v. Power* [1994] 1 S.C.R. 601, 615.

390. See *United States v. Leon* [1996] 1 S.C.R. 888, 892.

391. Moreover, the functions of the Minister of Justice are distinct from those of the Attorney General. See *Guérin c. Canada (Ministre de la Justice)* [1996] R.J.Q. 1457, 1464 (Que. C.A.) (Can.), *leave to appeal refused*, [1996] 3 S.C.R. ix (Can.).

392. See *Swystun* [1987] 50 Man. R.2d at 134.

one state with offenses stemming from the same transaction. Thus, the domestic authorities decide either to prosecute domestically and refuse to extradite or decline to prosecute domestically in favor of surrender for extradition.

In *Leon*, the fugitive sought material relating to the Minister's decision to surrender him for extradition rather than pursue charges against him in Canada. He argued that this material was necessary to vindicate his rights under section 6(1) of the Charter, and therefore the Minister was obliged to provide it to him. The Ontario Court of Appeal did not doubt that the Minister owed a duty of fairness to the fugitive and was obliged to observe the requirements of natural justice in making the surrender decision. The scope of the duty of fairness was closely related to the nature of the proceedings and the consequences of the decision for the fugitive.<sup>393</sup>

The Court held that the Minister's surrender decision was political rather than judicial in nature. Although the Minister was obligated to disclose the case against the fugitive and provide him with a reasonable opportunity to respond, there was no obligation to hold an oral hearing or to provide further disclosure. The fugitive sought the basis on which the Minister had exercised his discretion not to prosecute him in Canada. The Court held that its ability to review the exercise of prosecutorial discretion was very limited.<sup>394</sup>

Justice Laskin conceded that in appropriate circumstances an improper motive underlying the Minister's decision to prefer extradition over prosecution in Canada would justify judicial review of prosecutorial discretion. There must be "an air of reality" to such an allegation, however, before the Court will order disclosure of the information sought by the fugitive.<sup>395</sup> Justice Griffiths in *Leon* reached a similar conclusion: The Court will only interfere in the exercise of prosecutorial discretion "[w]here there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community . . . ."<sup>396</sup> The fugitive could not demonstrate such improper motives, other than evidence that he would face more severe penalties for the charges in the United States. The Court concluded that the Minister had not breached his duty of fairness to the fugitive in refusing to order production of the material relating to the surrender decision.

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393. See *Idziak v. Canada (Minister of Justice)* [1992] 3 S.C.R. 631, 656-57 (Can.).

394. See *R. v. Power* [1994] 1 S.C.R. 601, 616 (Can.) (outlining strict test to be met to find abuse of process); see also *United States v. Dikken* [1996] A.Q. No. 1340, ¶ 18 (Que. C.A.) (Can.) (Fish, J., concurring) (arguing that threshold for judicial intervention is high), *leave to appeal refused*, [1996] 3 S.C.R. vii (Can.).

395. See *United States v. Whitley* [1994] 119 D.L.R.4th 693, 708 (Ont. C.A.) (Can.), *aff'd*, [1996] 1 S.C.R. 467 (Can.).

396. *United States v. Leon* [1995] 96 C.C.C.3d 568, 575 (Ont. C.A.) (Can.) (citing *Power* [1994] 1 S.C.R. at 616), *aff'd*, [1996] 1 S.C.R. 888 (Can.).

The fugitive in *Leon* faced charges in both Canada and the United States. He argued that prosecution in Canada was a "realistic and equally effective option"<sup>397</sup> that the Minister was obliged to pursue. In the Court's view, the Minister had applied the relevant legal principles properly and had expressly taken into account several of the factors enumerated in *Cotroni* and in article 17 *bis* of the Treaty. Ultimately, the Minister had decided that prosecution in Canada would not be equally effective, and there were no legal grounds to dispute this decision. The *Leon* court distinguished *Cotroni* on the basis that *Cotroni* concerned conduct in Canada for which the fugitive could have been criminally charged in both Canada and the United States. Conversely, in *Leon*, the fugitive was faced with charges in each country relating to "discrete and separate acts of misconduct in both jurisdictions."<sup>398</sup> The charges that the fugitive faced in the United States were broader than those that he had faced in Canada. In essence, the court of appeal held that *Leon* was not a transnational offense case after all.

By contrast, Justice Lambert, dissenting in *Ross*, outlined a more ambitious role in extradition cases for section 6(1) of the Charter. He contended that most states with extradition treaties grant their own citizens greater protection than non-citizens against foreign extradition requests. This analysis is not quite correct. Although generally true for civil law states, which often are willing to prosecute on the basis of nationality jurisdiction, the historical practice of common law countries has been to treat nationals and foreign citizens identically.<sup>399</sup> Moreover, the refusal of some states to extradite their own nationals is a controversial practice that increasingly has come under attack.<sup>400</sup>

Nevertheless, Justice Lambert suggested that U.S. nationals may enjoy greater constitutional protection than foreign nationals against extradition to face charges in a foreign state.<sup>401</sup> As a general rule, however, the United States does not provide greater constitutional protection in the extradition context to its nationals (as compared with foreign citizens) in the absence of

397. *Whitley* [1994] 119 D.L.R.4th at 708.

398. *Leon* [1995] 96 C.C.C.3d at 575; see also *Great Britain v. Taylor* (No. 2) [1990] O.J. No. 2015 (Ont. Gen. Div.) (Can.) (staying charges against fugitive in Canada in favor of rendition to United Kingdom), *aff'd*, Doc. CA 1046/90, Mar. 18, 1991 (Ont. C.A.) (Can.).

399. *But cf.* Extradition Act, 1988, § 45 (Austl.) (permitting Australia to prosecute Australian nationals for foreign offenses when Australia has declined to extradite them on basis of Australian nationality). The provision has not yet been applied by the courts.

400. See Christian Shachor-Landau, *Extra-Territorial Penal Jurisdiction and Extradition*, 29 INT'L & COMP. L.Q. 274, 286-89 (1980); Williams, *supra* note 373, at 96-100.

401. See *United States v. Ross* [1994] 119 D.L.R.4th 333, 353 (B.C. C.A.) (Can.) (Lambert, J., dissenting) (citing *In re Assarsson*, 538 F. Supp. 1055, 1060 (D. Minn. 1982)), *aff'd*, [1996] 1 S.C.R. 469 (Can.). Justice Lambert made no reference to the Eighth Circuit's decision affirming the trial court. See *In re Assarsson*, 687 F.2d 1157 (8th Cir. 1982). It appears that he may have misread *Assarsson* as interpreting *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), to mean that the U.S. government faces barriers to the extradition of U.S. citizens. But *Valentine* says only that U.S. citizens may not be extradited in the absence of a treaty or legislative provision for doing so. See *Valentine*, 299 U.S. at 8. The rule in Canada is identical. See *In re Insull* [1933] 60 C.C.C. 254 (Ont. S.C.) (Can.) (holding that there is no power to extradite in absence of statutory basis).

a specific treaty provision empowering it to do so.<sup>402</sup> These considerations suggested to Justice Lambert that granting greater protection to Canadians under section 6 of the Charter than that accorded to foreign citizens would not "create a gap in the network of international comity created by the extradition laws."<sup>403</sup> But, of course, it would do exactly that. Such an interpretation of section 6(1) would undermine Canada's treaty obligations with foreign states, obligations that the Supreme Court has indicated Canadians "have a very real interest" in seeing "properly fulfilled."<sup>404</sup>

This is not to say that section 6(1) of the Charter should play *no* role in protecting the rights of Canadian citizens facing extradition abroad. Nonetheless, the scope of protection that section 6(1) provides must be defined with regard to the history of extradition practice and the reality of international relations. In *Cotroni*, Justice La Forest emphasized that the history of the Canada-United States extradition relationship demonstrated that ease of travel between the two countries made it imperative that neither state grant special privileges to its own nationals in the extradition process.<sup>405</sup> The question is one of establishing a proper balance. The logical extension of Justice Lambert's approach would be that section 6(1) would *compel* the adoption of nationality-based prescriptive jurisdiction, a thoroughly implausible result<sup>406</sup> and one specifically addressed by Justice La Forest in *Cotroni* itself.<sup>407</sup>

Any advocate of a standard of judicial review in extradition cases that contemplate the quashing of surrender orders on the basis of human rights concerns, such as the ones put forward in this Article, necessarily must address the problem of what to do with fugitives in the event that such a surrender order *is* quashed. Given that Canada is unlikely, under existing law,

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402. See *United States v. Allard* [1987] 1 S.C.R. 564, 571-72 (Can.); *R. v. Schmidt* [1987] 1 S.C.R. 500, 525 (holding that fugitive's U.S. citizenship does not entitle him to special protection from application of foreign law and procedures after extradition); see also *Charlton v. Kelly*, 229 U.S. 447, 465-69 (1912) (holding that U.S. citizenship does not provide protection against extradition); *Neely v. Henkel* (No. 1), 180 U.S. 109, 123 (1901); *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986) (rejecting argument that U.S. citizens cannot be extradited); *Escobedo v. United States*, 623 F.2d 1098, 1104-07 (5th Cir. 1980) (same); RESTATEMENT, *supra* note 104, § 475 reporter's note 4.

403. *Ross* [1994] 119 D.L.R.4th at 352 (Lambert, J., dissenting).

404. *Idziak v. Canada* (Minister of Justice) [1992] 3 S.C.R. 631, 663 (Can.).

405. See *United States v. Cotroni* [1989] 1 S.C.R. 1469, 1490-91 (Can.).

406. Several common law states have recently moved to enact nationality-based jurisdiction statutes for "child sex tourism" offenses. See, e.g., Crimes (Child Sex Tourism) Amendment Act, 1994 (Austl.); An Act to Amend the Criminal Code (Child Prostitution, Child Sex Tourism, Criminal Harassment and Female Genital Mutilation), ch. 16, 1997 S.C. (Can.) (allowing for prosecution of Canadian citizens and permanent residents for acts or omissions committed outside Canada that would constitute sexual offense against children if committed in Canada); Sex Offenders Act, 1997 (U.K.); Sexual Offenses (Conspiracy and Incitement) Act, 1996 (U.K.). Such legislation is meant to address a relatively narrow problem, however; it is difficult to view these statutes as establishing a greater trend towards extraterritorial regulation of the activities of nationals. Nationality-based prescriptive jurisdiction, of course, has a strong foundation in international law, as recently reaffirmed by the International Court of Justice (ICJ). See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14). But there are simply no grounds for believing that the Charter requires Canada to adopt it.

407. See *Cotroni* [1989] 1 S.C.R. at 1494.

to have a jurisdictional basis to prosecute in such circumstances, legislation allowing Canada to prosecute such fugitives would be desirable.<sup>408</sup> The practical obstacles to a successful prosecution could well prove formidable, however. In any case, there is a world of difference between the view that promulgating such legislation would be prudent and the assertion that it is constitutionally compelled. There simply is no support for the latter contention.

In *Ross*, Justice Lambert interpreted *Cotroni* to mandate that prosecution take place in Canada if it is a "realistic option" so that section 6(1) of the Charter would be minimally impaired for the purposes of the section 1 test set forth in *R. v. Oakes*.<sup>409</sup> He came perilously close to suggesting, however, that "realistic" is synonymous with "possible." Justice Lambert's reasoning is reminiscent of that of civil courts before the recognition of the forum non conveniens doctrine, which were reluctant to deprive litigants of access to domestic courts by staying proceedings in favor of trial abroad.<sup>410</sup> The forum non conveniens doctrine has won out in civil cases, largely due to an increased appreciation on the part of domestic courts that justice administered by foreign courts may be comparable to domestic justice. A similar respect for the quality of foreign justice should develop with regard to extradition matters. Accordingly, "realistic option" cannot properly be interpreted to mean merely any possibility of prosecution in Canada. Rather, in cases involving Canadian citizens charged with a transnational offense, it should be interpreted to require the Canadian authorities to satisfy a test modeled on a civil forum non conveniens determination (as in *Swystun*)<sup>411</sup> in accordance with a civil burden of proof.

### E. Summary

Despite the pronouncements of the Supreme Court of Canada in *Cotroni*, it is evident that the role of Canadian citizenship in the extradition process has not yet been conclusively determined. It seems likely that *Burns* soon will force the Court to face a challenge to the logic of *Cotroni*. This Article has argued that the Court should not retreat from the position it adopted in *Cotroni*, which contemplates a circumscribed role for Canadian citizenship. To do otherwise would be, in effect, to mandate constitutionally the adoption of nationality-based jurisdiction in some form. This would be a strange result, both because there is no basis for it in Canadian law and because Canada would be compelled to adopt nationality-based jurisdiction just

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408. Australia already has such legislation in place. See *supra* note 399; Breitenmoser & Wilms, *supra* note 96, at 881-82; *Crime Knows No Country*, *supra* note 372 (arguing in favor of Canadian legislation allowing domestic prosecution for ordinary offenses committed abroad).

409. See *R. v. Oakes* [1986] 1 S.C.R. 103, 135-40 (Can.).

410. See, e.g., *The Atlantic Star* [1973] Q.B. 364, 381-82 (Eng. C.A.), *rev'd*, [1974] App. Cas. 436, 453 (H.L.) (appeal taken from Eng.).

411. See *United States v. Swystun* [1987] 50 Man. R.2d 129, 133-34 (Man. Q.B.) (Can.).



as that form of jurisdiction is coming under increased criticism in the civil law states that have long favored it.

Canadian citizenship's role in the extradition process should be limited, but not nonexistent. It should play a greater role when the fugitive could face charges either in Canada or the requesting state. In such circumstances, the factors that influence the executive in deciding whether to extradite the fugitive or prosecute the fugitive in Canada are similar to those present in a civil forum non conveniens context. Canadian citizenship should force the government to demonstrate that it is more appropriate that the fugitive be extradited to face prosecution abroad rather than face charges in Canada.

## V. CONCLUSION

In *Jamieson II*, *Ross*, *Whitley*, and *Leon*, the Supreme Court of Canada was presented with excellent opportunities to clarify and further elaborate its pronouncements in earlier Charter extradition cases, particularly *Cotroni*, *Schmidt*, *Kindler*, and *Ng*. Regrettably, the Court chose not to embrace these opportunities. The Court would have done well to place on a more objective footing its earlier decisions relating to the effect of the treatment that the fugitive is likely to face in the requesting state upon review of the ministerial surrender decision under section 7 of the Charter. At the same time, the Court could have elucidated its interpretation of section 7 in the extradition context in order to provide clearer guidelines for the lower courts.

*Burns* and *Hurley* may well present the Supreme Court with new opportunities to balance the public interest in maintaining an effective system of extradition against the rights of fugitives. This balance is a difficult one to achieve. To date, the Court has reached the proper results, but not necessarily for the right reasons. The two new cases point out weaknesses in that logic that will force the Court to reforge the foundation of extradition law in the Charter era. In undertaking this task, the Court must resist the temptation to adopt a more intrusive standard of review such as the domestic threshold standard. The domestic threshold standard of review is practically unworkable and theoretically incoherent. Instead, the Court should refine its existing residual threshold standard by reference to the principles that underlie it.

In future cases, the Court should make greater reference to international human rights materials so that it may give a more defined shape to vague section 7 standards such as "shocking the conscience" and "simply unacceptable." In general, only conduct that is "incontrovertibly shocking"—as evidenced by near-unanimity on the international plane—should prevent extradition. While admittedly minimal, the categories of such conduct are not closed; they will evolve in step with international human rights law itself. This approach has the advantage of integrating international human rights standards with domestic constitutional norms and state responsibility for human rights violations. The Court could refer to the Fugitive Of-

fenders Act as a source for structuring section 7 review. Conflict of laws jurisprudence also provides an indication of the approach that the Court should adopt in extradition cases. Taken together, these considerations balance the rights of fugitives against the smooth operation of the extradition system.

The Court should allow section 6(1) of the Charter to play a more explicit role in the extradition process. At first blush, this might seem to require a retreat from the Court's pronouncements in *Cotroni*, which appear to contemplate a highly circumscribed role for section 6(1); however, the actual application of the proposed role for section 6(1) would be sensitive to the concerns that Justice La Forest set out in that case. In transnational offense cases, Canadian citizens should enjoy a prima facie right to be tried for the offense in Canada, subject to the government's ability to demonstrate under a *Swystun*-like test that it would be more appropriate for the fugitive to be tried abroad. By contrast, in cases involving exclusively foreign offenses, where there is no basis to prosecute the fugitive for the offense in Canada, Canadian citizenship should not provide extra protection against extradition.

The task of balancing the rights of individual fugitives against the weighty public interest in an effective and speedy extradition system is a difficult one. In the Charter era, increased awareness of the rights of fugitives has driven the Supreme Court of Canada to adopt a form of residual threshold standard of review with regard to ministerial surrender decisions in extradition cases. Insofar as the adoption of a residual threshold standard of review involved a move away from the traditional non-inquiry standard that had guided the courts in extradition cases, the decision was a correct one. Although the move to a residual threshold standard has not mollified the critics who agitate for a full-blown domestic threshold standard of review in extradition cases, a domestic threshold standard of review tilts the balance too far in favor of fugitives' rights and gives insufficient attention to the international context in which extradition must operate.